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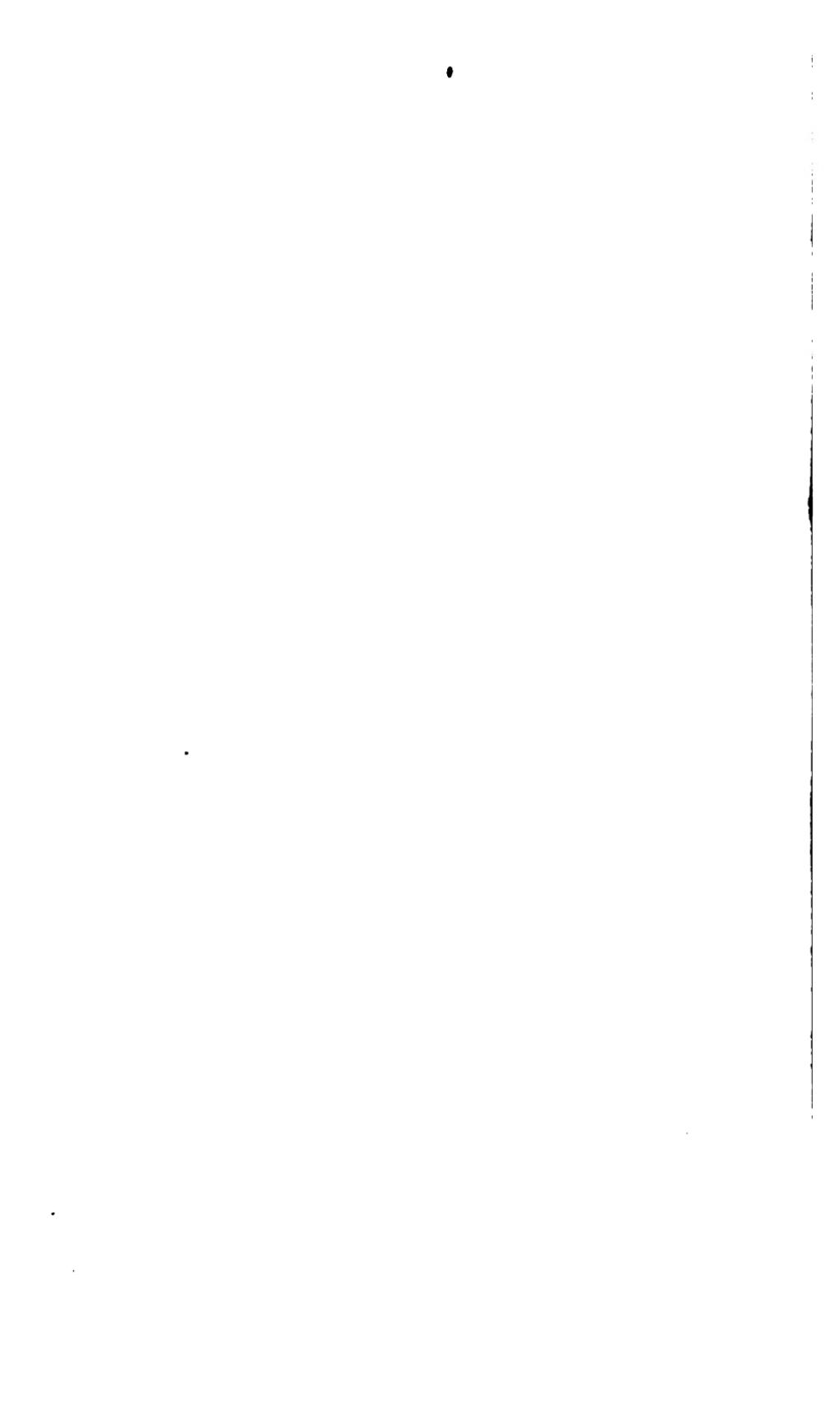


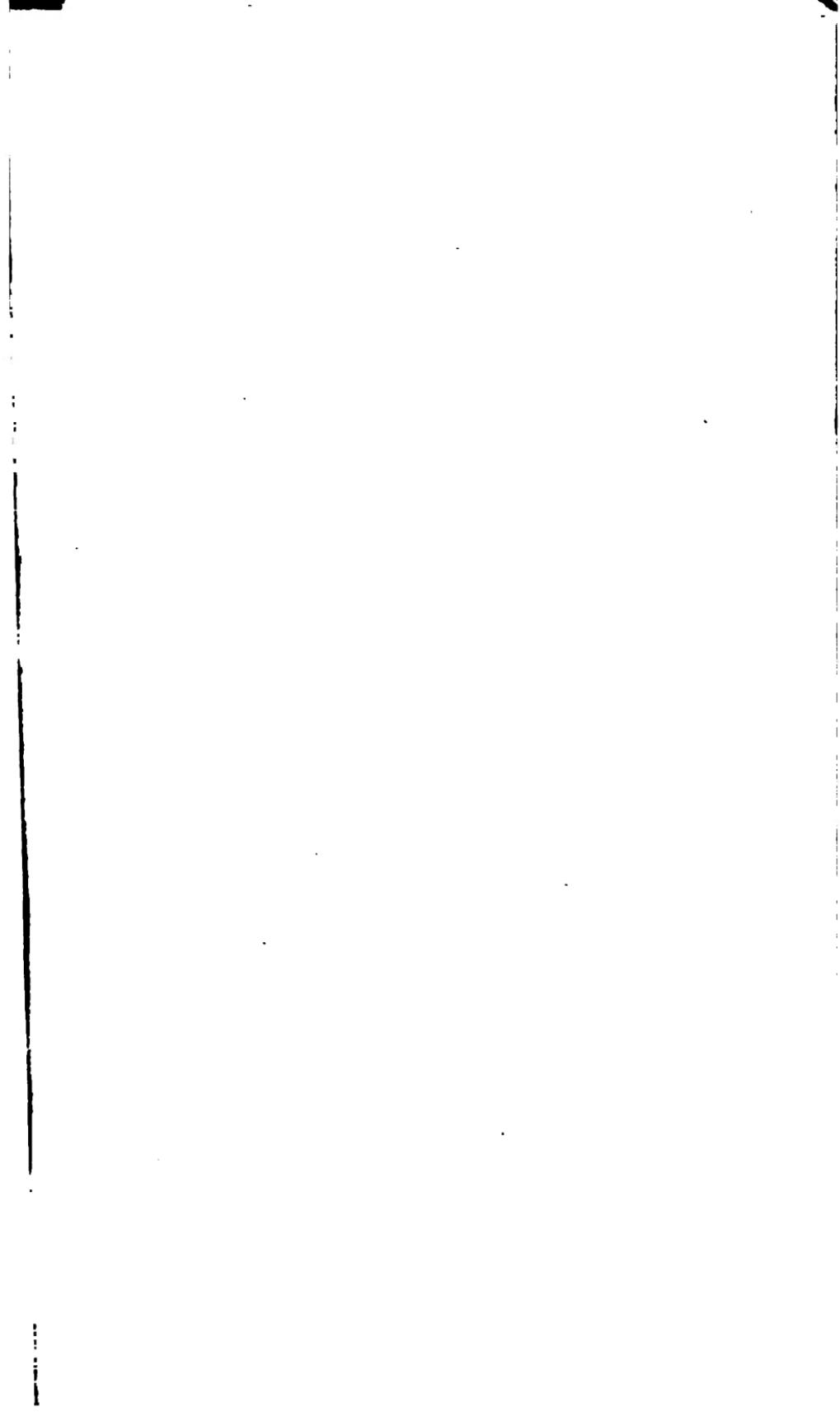
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA,

AT

THE DECEMBER TERM, 1892; THE MARCH, JUNE, AND
OCTOBER TERMS, AND A PORTION OF THE
DECEMBER TERM, 1893.

BY
FLETCHER MADDOX,
REPORTER.

VOLUME XIII

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JUDGES

OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

Hon. HENRY N. BLAKE,¹ Chief Justice.

Hon. WILLIAM Y. PEMBERTON,² Chief Justice.

Hon. EDGAR N. HARWOOD,
Hon. WILLIAM H. DE WITT,³ Associate Justices.

OFFICERS OF THE COURT.

HENRI J. HASKELL, Attorney General.

WILLIAM J. KENNEDY,⁴ Clerk.

BENJAMIN WEBSTER,⁴ Clerk.

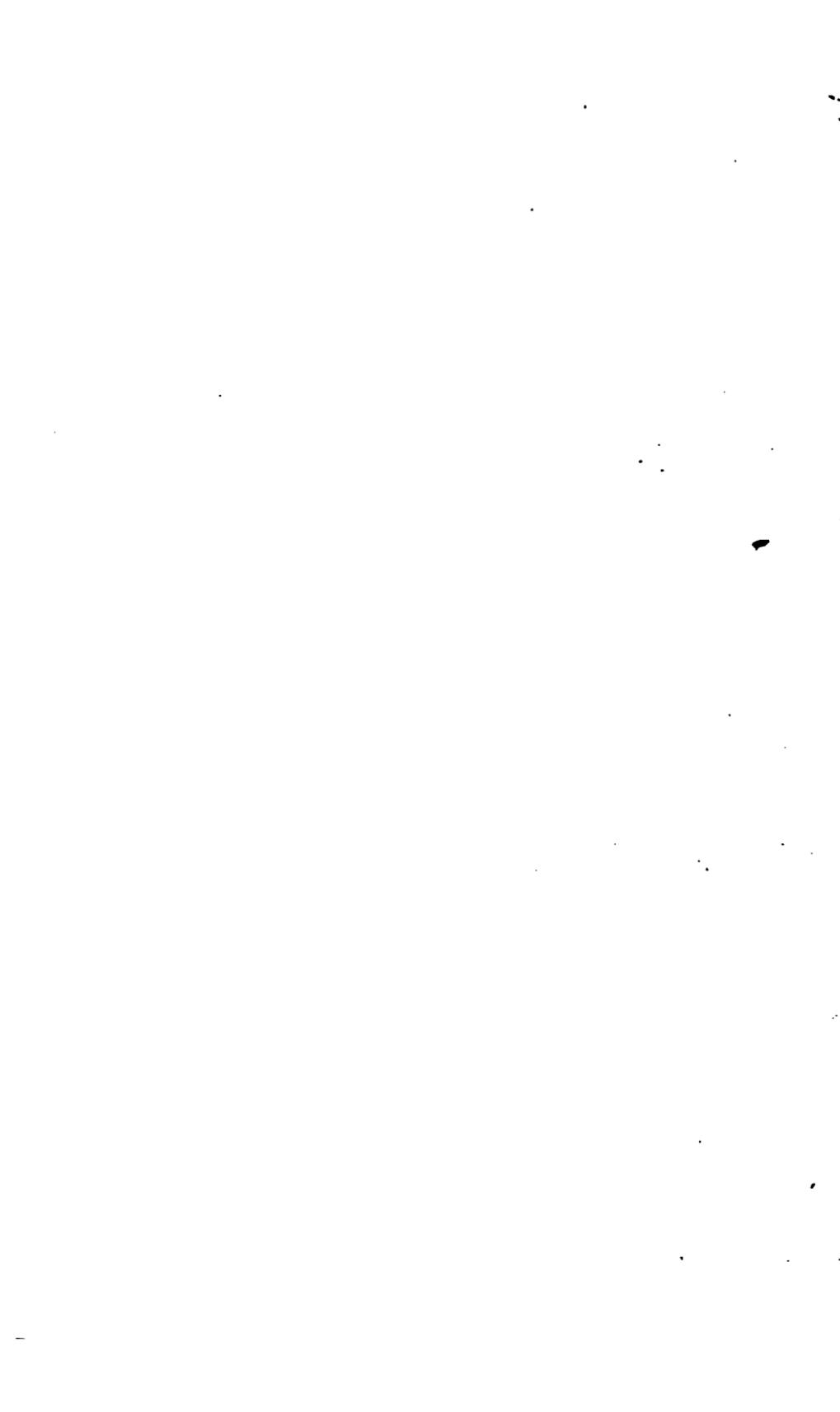
FLETCHER MADDOX, Reporter.

¹ Term of office expired November 8, 1892.

² Qualified, January 2, 1893.

³ Term of office expired November 8, 1892.

⁴ Qualified, January 2, 1893.



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CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1892.

PRESENT:

Hon. HENRY N. BLAKE, Chief Justice.
Hon. EDGAR N. HARWOOD, } Associate Justices.
Hon. WILLIAM H. DE WITT,

STATE EX REL. COPE v. MINAR, COUNTY TREASURER.
(Submitted April 25, 1892. Decided December 19, 1892.)

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**COUNTIES—Appeal from allowance of claim by county commissioners—Warrants—
Mandamus.**—Where a tax-payer has taken an appeal to the District Court from an allowance by a board of county commissioners of a claim against a county, as permitted by sections 764, 765, fifth division of the Compiled Statutes, and thereafter a judgment by default is rendered by such court upon the failure of the board to appear, adjudging such claim illegal and setting aside the allowance of the same, without a trial or inquiry of any character respecting its merits, such judgment is unauthorized and constitutes no defense to an application for a writ of mandamus to compel the payment by the county treasurer of a warrant issued in payment of such claim, as the statute relating to appeals in such cases, not requiring notice of the appeal to be given to the holder of the warrant, contemplates that the District Court will review the proceedings of the board of county commissioners. HARWOOD, J., concurs in the issuance of the writ, holding that the judgment declaring the claim void solely for the default of the board of county commissioners was unwarranted, as such board, having no interest in supporting the claim, was not the real party in interest or the proper party respondent or defendant. DE WITT, J., concurs in the issuance of the writ, holding that the District Court acquired no jurisdiction of the appeal, in that the notice of appeal required to be served upon the clerk of the board was only filed with him, and that such filing was not a service. (Citing *Territory v. Hanna*, 5 Mont. 246; *State v. Gibbs*, 10 Mont. 210.)

Original proceeding. Application for a writ of mandamus.

Walsh & Newman, for Relator.

John W. Tattan, for Respondent.

BLAKE, C. J.—This is an application for a writ of mandamus to be issued out of this court to the county treasurer of Choteau County, commanding him to pay a certain warrant, which was issued June 6, 1891, to Barnard Brown, by order of the board of county commissioners of the county. The respondent alleges in his answer that there were no funds applicable to the payment of this warrant prior to the sixth day of October, 1891, and at that time the same was canceled, by virtue of a judgment of the District Court of said county, and for this reason the application should be denied. The account of Brown was allowed, and this warrant therefor was issued June 6, 1891, and presented for payment and registered June 9, 1891. The relator, George F. Cope, has been the holder and owner of the warrant since the eleventh day of June, 1891. The foregoing proceedings were had before the entry of the judgment, which is specified in the answer. A notice of appeal was filed June 27, 1891, in the District Court of Choteau County:—

**"STATE OF MONTANA, } ss.
COUNTY OF CHOTEAU."**

"To Alfred E. Rogers, Esq., County Clerk of the County of Choteau, and ex officio Clerk of the Board of Commissioners of said County of Choteau:—

"You will please take notice that William H. Todd, a resident and tax-payer of the county of Choteau, and State of Montana, feeling aggrieved by a certain allowance made by the board of commissioners of the said county of Choteau, at its regular June session, 1891, in favor of one B. Brown, in the sum of eleven hundred dollars (\$1,100) for work done by said B. Brown, as expert, in examining the accounts of said Choteau County, as excessive, unjust to the county of Choteau, and illegal, will appeal, and hereby does appeal, to the District Court of the Tenth Judicial District of the State of Montana, in and for the county of Choteau, from the allowance made by said board of commissioners of the county of Choteau to

B. Brown, on the second day of June, 1891, in the sum of eleven hundred dollars, upon the grounds that such allowance of eleven hundred dollars (\$1,100), made to said B. Brown, on the date, is excessive, unjust to the county of Choteau, and is illegal; and the said William H. Todd hereby appeals from the same to said District Court."

A bond, with two sureties, was also executed by said Todd. This notice and bond were prepared to enable Todd to appeal from the decision of the board of county commissioners, under this statute: "Whenever a claim of any person against the county shall be disallowed, in whole or in part, or when any tax-payer of the county shall feel aggrieved by any allowance made by the board as excessive, unjust to the county, or illegal, such person may appeal from the decision of such board to the District Court for the county, by causing a written notice of such appeal to be served on the clerk of such board, within thirty days after the making of such decision or allowance, and executing a bond to such county, with surety, to be approved by the clerk of such board, conditioned to prosecute such appeal to effect, and to pay all costs that shall be adjudged against the appellant." (Comp. Stats. div. 5, § 764.) The statute further enacts: "Such appeal shall be entered, tried, and determined the same as appeals from Justices' Courts, and costs shall be awarded in like manner." (Comp. Stats. div. 5, § 765.)

All the proceedings in the District Court comprise two records. An order was entered October 2, 1891, in the following words: "*William H. Todd, Appellant, v. Board of County Commissioners of Choteau County, Respondents.* In this cause, the default of defendants having been duly entered, the court orders that judgment be entered in favor of plaintiff." The confusion arising from the use of the word "plaintiff" and "defendants" disappears when we read the judgment, which is as follows: "In the Tenth Judicial District Court of the State of Montana, in and for the county of Choteau. *William H. Todd, Appellant, v. The Board of Commissioners of Choteau County, Montana, Respondent.* In this action, William H. Todd, who is a tax-payer of the said county of Choteau, having regularly prosecuted an appeal, under the statute in such case made and provided, from the action of the board of commissioners of said

county of Choteau, in allowing at their June, 1891, meeting, the claim of one Barnard Brown, in the sum of eleven hundred dollars (\$1,100), and in issuing the warrant of said county thereon in said sum of eleven hundred dollars (\$1,100), which warrant is numbered 5868, on the general fund of said county; and said appeal having duly come on for trial this second day of October, A. D. 1891, and no appearance being had in opposition thereto by said board of county commissioners, the default of said board in the premises was duly noted, and application for judgment on said appeal was thereupon made by said appellant. The court, being fully advised in the premises, sustained said motion. Wherefore, by virtue of the law and the premises, it is hereby ordered, adjudged, and decreed that said claim of Barnard Brown is illegal, and not a proper charge against said county of Choteau, and the said action of said board of commissioners in allowing the same is hereby disapproved, reversed, and set aside; and it is further ordered, adjudged, and decreed that the warrant issued by said board of county commissioners on the general fund of said county, the same being numbered 5868, is void, and of no effect; and the same is hereby ordered to be canceled and set aside." There is no record of any further action in that tribunal, and no attorney appeared therein for any of the parties. The statute does not require that notice of these proceedings shall be given to the holder of the warrant, or the original claimant, and it is contemplated that the District Court will review the proceedings of the board of county commissioners. The appellate jurisdiction of the District Court is generally exercised when there has been a service of an appropriate notice upon the interested parties, but this class of cases forms an exception. There was no trial or inquiry of any character respecting the merits of the account of said Brown, and the court seems to have entered a judgment by default by reason of his failure to appear and answer. The claim of Brown was not litigated, and no evidence was heard, and there was no statement of the facts upon which the decision could be rendered.

We are of opinion that the court did not have the authority to adjudicate in this manner that the account was an illegal charge against the county of Choteau. The judgment does not

therefore constitute a defense. It is ordered that the writ of mandate be issued, in accordance with the application of the relator.

Writ granted.

HARWOOD, J. (concurring).—The judgment in this case shows on its face that the claim in question was adjudged "illegal," without any hearing or inquiry as to the merits thereof, on the ground that the board of county commissioners had made default in failing to appear and maintain the validity of said claim in the District Court, upon appeal from the allowance by the county commissioners. It appears from the record "that, the default of defendants having been duly entered, the court ordered that judgment be entered in favor of plaintiff." The decree then declares that, "said appeal having duly come on for trial, this second day of October, A. D. 1891, and no appearance having been had in opposition thereto by said board of county commissioners, the default of said board in the premises was duly noted, and application for judgment on said appeal was thereupon made by said appellant. The court, being fully advised in the premises, sustained said motion. Wherefore, by virtue of the law and the premises, it is hereby ordered, adjudged, and decreed that said claim of Barnard Brown is illegal, and not a proper charge against said county of Choteau, and the action of the said board of commissioners in allowing the same is hereby disapproved, reversed, and set aside." In these proceedings it appears the board of county commissioners, from whose action the appeal was taken, is styled "defendants" and "respondents;" and solely because said board did not appear and maintain the legality of said claim, on appeal, the same was declared illegal, and the allowance anulled, without trial or inquiry as to the merits or legality thereof. Such action was, in my opinion, clearly unwarranted in law. Why the board of county commissioners was styled and considered in the proceedings as "defendants" or "respondents," and, on the premise of its default, the claim of Brown against said county declared illegal, has not been made clear by pointing out any support for such theory in law or practice. The appeal is from the action of the board of county commis-

sioners, sitting as such, in considering and allowing a claim against the county; and neither the board, nor any member of it, should be interested in such claim, nor in the question of its allowance or rejection on appeal. There is no provision of the statute, nor is there any analogy or practice, to support the idea that the board of county commissioners is a respondent in such case, or that its default is ground for declaring the claim in question illegal. It would be as proper to consider a justice of the peace respondent or defendant in an appeal from his court, and finally determine the rights of the parties in interest on the premise that the justice of the peace had made default in failing to appear and support his decision, as to consider the board of county commissioners respondent or defendant in such an appeal as this. Nor is there any ground in law or practice for declaring the claim null and void simply because the board of county commissioners failed to appear and maintain the validity of the claim on appeal. The real party in interest, that is, the claimant, or his legal representative, would, by all analogies of practice, be the proper respondent in such an appeal. In other appeals such party in interest is respondent, and is required by statute to be served with notice of appeal. The statute, however, in this case, does not directly provide that the party prosecuting the claim, or his legal representative, shall be served with notice of appeal; but, because no such notice is provided for, the court is not precluded from causing such party to be notified, nor from investigating the claim on its merits, as to whether it is "excessive, unjust to the county, or illegal." Such appeal is taken on the ground that the allowance is "excessive, unjust to the county, or illegal," and thereby the appellant takes the claim into the District Court for re-examination by that court, sitting in the attitude of the board of county commissioners, to review the merits of the claim. The very ground of appeal stated in the statute that the allowance made by the board, is "excessive, unjust to the county, or illegal," indicates the purpose of appeal. If it appeared to the court that the party in interest was a necessary party to be before the court, in order to satisfactorily try and determine the reasonableness or legality of the claim, the court is enabled, by provision of statute, to order such

party to be brought in by notice. Section 26 of the Code of Civil Procedure provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but, when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in." The statute provides the method by which a tax-payer may remove a claim allowed by the board of county commissioners into the District Court, and there contest the allowance, on the ground that it is excessive, unjust, or illegal. The board of county commissioners are in no sense to be considered respondent or defendant to appear and maintain the validity of the claim on such appeal; and, in my opinion, a judgment declaring the claim illegal on the sole ground that the county commissioners made default therein, as appears to have been done in this case, is unwarranted in law.

The style in which the appeal in question appears to have been taken, and put upon the calendar of the District Court, and the proceedings therein carried on, tended to obscure the real character and purport of the action. The title of the case was *William H. Todd, Appellant, v. The Board of Commissioners of Chouteau County, Montana, Respondent.* When that case was called for the purpose of entering default of the board of county commissioners, as is usual in a court when default is about to be entered, there was nothing in the title to indicate that the proceeding related to or concerned the interests of Brown, the claimant, and the real party, in fact, whose rights were to be affected thereby. Nor would the calling of the board of county commissioners to enter its default give Brown any such warning or notice. If Brown had been in court in person or by counsel, there appears to have been nothing in the title of the case, or the mere calling and entering default of the board of county commissioners, to warn him that judgment was about to be pronounced, declaring his claim null and void. The theory upon which the proceeding was carried on appears to have been that claimant Brown was a stranger thereto, not to be called or considered a party in the case, notwithstanding his rights were to be determined thereby. This is contrary to the law and practice; and although the statute had not required

service of notice of appeal on the claimant, who is the real respondent in such case, the proceedings should not be carried on in such a manner and under such a title as to obscure the real nature thereof, and add the harshness of summarily calling a party in no way interested in supporting the claim, and, solely on such default, declaring the claim null and void, regardless of its merits. Such a practice could be used to work great injustice, by carrying a proceeding on in the name of one in no way the proper party, and, on his default, entering judgment, determining the rights of others who are not made parties or called, and whose default is not entered. For these reasons, based upon what is shown on the face of the judgment record, I concur in the conclusion that the judgment in question cannot be pleaded as determining the rights of the claimant. But I do not concur in holding said judgment void, or in allowing it to be questioned in this proceeding, on the ground that notice of appeal from the county commissioners was not served on the county clerk. That, in my opinion, would be going outside of the grounds on which a judgment can be questioned or held void, in a collateral attack. The service of notice may have been made or waived, and service could have been proved or admitted in the District Court. The judgment of the District Court recites that the appeal was "regularly prosecuted" from the allowance by the board of county commissioners, "under the statute in such case made and provided." In a collateral attack on a judgment, pronounced by a domestic court of record, having jurisdiction of the subject-matter, the absolute verity of its declarations, and the regularity of proceedings not required to be shown on the face of the judgment record, are presumed. In the case of *Territory v. Hanna*, 5 Mout. 246, the question as to the service of notice of appeal came up, and was considered as a direct question of practice, affecting the appeal of that case to the Supreme Court. We are considering the judgment pleaded here from no such point of view.

DE WITT, J. (concurring).—I concur in the result of this case, on the ground that that which is pleaded as a judgment of the Tenth District Court is void, for the reason set forth below. The relator asks that the respondent pay a county warrant which he holds. Respondent's defense is that the warrant was canceled

by a judgment of the District Court. The account on which the warrant was issued was allowed by the board of commissioners; and, under the provisions of section 764 of the General Laws, a tax-payer, William H. Todd, undertook to appeal from the action of the board of county commissioners in allowing the account. That section provides that any tax-payer who feels aggrieved by an allowance made by the board of commissioners may appeal by taking certain steps, one of which is by causing a written notice of such appeal to be served on the clerk of such board. Such notice of appeal was filed with that clerk, but not served upon him. Such filing with the clerk is not service upon him. (*Territory v. Hanna*, 5 Mont. 246.) If no notice of appeal was served upon the clerk, no appeal was taken. This court said in the *Hanna Case*, and affirmed in *State v. Gibbs*, 10 Mont. 210, as follows: "Appeals are matters of statutory regulation. There must be a substantial compliance with the statute in order to confer jurisdiction upon the appellate court. The appellant is charged with the duty of perfecting his appeal in the manner provided by law, and error in this regard affects the jurisdiction of the appellate court." The District Court, therefore, on the appeal of Todd, had no jurisdiction. Todd could have appealed by observing the law, but this he failed to do. The judgment is therefore void. A void judgment can be used for no purpose. As said by Mr. Black in his work on Judgments (1 Black on Judgments, § 170), and as I had occasion to quote in reference to a void judgment, in *State v. Benton*, 12 Mont. 66: "A void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication; nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever. . . . It is not necessary to take any steps to have it reversed, vacated, or set aside; but, whenever it is brought up against the party, he may assail its pretensions, and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." The judgment, therefore, annulling the warrant, was void, and no defense to this application for mandamus. For this reason I agree that the writ issue.

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GREGG, APPELLANT, v. GARRETT, RESPONDENT.

[Argued June 1, 1892. Decided December 19, 1892.]

NEW TRIAL—Notice of intention.—Where a notice of intention to move for a new trial fails to state whether the motion will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case as required by section 298 of the Code of Civil Procedure, an appeal from an order denying the motion will be dismissed in the absence of a waiver of such defect by the adverse party.

SAME—Notice of motion—Waiver of defective notice.—The mere appearance of respondent's counsel when a motion for a new trial based upon a defective notice is heard does not amount to a waiver of the defects apparent in the notice, and in the absence of anything in the record showing a waiver thereof, an appeal from an order denying the motion will be dismissed.

CLAIM AND DELIVERY—Pleading—Statute of Frauds.—Where both parties in an action of claim and delivery alleged in the answer and replication the existence of an agreement concerning the cutting of grass upon plaintiff's land, and set forth the terms of such agreement without substantial difference, raising an issue only as to whether the defendant cut the grass within a reasonable time, an objection by plaintiff to the reception of proof as to any agreement whereby defendant claimed the hay, in that such agreement was not in writing and being for an interest in land was void under the Statute of Frauds, was properly overruled, for even if such objection were tenable under pleadings raising an issue thereon, it could not be interposed by plaintiff after admitting the agreement by verified replication.

Appeal from Eighth Judicial District, Cascade County.

Action of claim and delivery. Defendant had judgment below. Motion for new trial denied by BENTON, J. Affirmed.

Ed. L. Bishop, for Appellant.

Leslie & Downing, for Respondent.

HARWOOD, J.—This is an action of claim and delivery of personal property. Through the process therein, plaintiff recovered possession of a certain quantity of hay. Each party claimed to be the owner thereof. The trial resulted in a verdict by the jury in favor of defendant for the return of the hay to him, or the payment of one hundred dollars, the value thereof, to defendant by plaintiff, and judgment was entered accordingly.

Plaintiff prepared and served a notice of intention to move for new trial, wholly omitting to state therein, as required by statute, whether the motion would "be made upon affidavits, or

the minutes of the court or a bill of exceptions, or a statement of the case." (Code Civ. Proc. § 298.) It appears from the record that plaintiff prepared what purports to be a statement of the case as the basis for the presentation of his intended motion for new trial, and served the same on defendant's counsel. It does not appear that defendant or his counsel offered any amendment to said statement, or even acknowledged service thereof, or stipulated that the same was correct, or otherwise took any part in preparing or settling said statement. The judge of the court certified and allowed said statement of the case, and entered an order overruling the motion for new trial. Plaintiff appealed from that order, and from the judgment. Respondent now moves this court to dismiss the appeal from the order overruling plaintiff's motion for new trial, on the ground that plaintiff failed to comply with the statute in giving notice of intention to move for new trial, in that he failed to state therein on what moving papers he would present said motion.

This motion must be sustained. The statute provides as follows: "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court or referee, if the action was tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case." (Code Civ. Proc. § 298.) The notice is incomplete and defective, in not setting forth, as required by statute, the basis upon which plaintiff proposed to present the motion for new trial. The reason and importance of this requirement are apparent. Both parties have a right to know upon what papers the motion will be presented, and to participate in preparing the record, if the same has not already been made up by way of bills of exception. The defect in the notice of intention in this case is held to be ground for dismissal, unless the adverse party has waived the same by stipulation, or by co-operation in the formation of the papers upon which the motion is to be made, by amendment, or by some other act which constitutes a

waiver. (Hayne on New Trial and Appeal, §§ 12, 14, and cases cited; *White v. Superior Court*, 72 Cal. 475; *Bear River etc. Min. Co. v. Boles*, 24 Cal. 354; *Fabian v. Callahan*, 56 Cal. 160.)

In the case of *Hibernia etc. Loan Soc. v. Moore*, 68 Cal. 158, cited by appellant, the opinion shows that "the motion was made upon a prepared statement, to which amendments were proposed;" and this was considered a waiver of the defects in the notice of motion, unless in proposing such amendment the "objection was taken, or right reserved to object thereafter, to any irregularity in the proceedings leading up to or in connection with the settled statement." Also, in *Flateau v. Lubeck*, 24 Cal. 364, it appears that "a statement, which the parties agreed to as correct, was filed," and notwithstanding this it was held that the want of a proper notice of intention to move for new trial was such an irregularity as made the proceeding void. It is not here affirmed that we would follow that ruling. Reference to it is made to show what has been the holding under various conditions in which the question has been presented. In *Christy v. Spring Valley Water Works*, 68 Cal. 73, "the motion was heard and decided upon a statement of the case, proposed, amended, and certified." In view of such co-operation by the adverse party in preparing the statement and submitting the motion, without reserving any objection as "to any irregularity in the proceedings on the motion," the court held that such objection was waived. We find nothing in the record which has been held in the authorities cited by appellant as a waiver of the irregularities in the notice of motion upon which this proceeding was had.

Appellant's counsel insists that the appearance by counsel for respondent when the motion was heard amounts to a waiver of the defects apparent in the notice. The record in this case can only be construed to show that respondent's counsel appeared when the motion was submitted to the court. We think it would be going too far to hold that this was a waiver of the omission to give a proper notice according to the plain directions of the statute. (Hayne on New Trial and Appeal, §§ 14, 145, and cases referred to.) Appellant's counsel also contends that respondent should have caused the record to show that he

took advantage of the defect in the notice on the hearing of the motion in the court below. At most, that would have been placing in the record mere argumentative matter. The defect taken advantage of is apparent in the notice itself, and requires no other matter inserted in the record to show this fact. This irregularity in presenting the motion, without stipulation or other action amounting to a waiver of proper notice, may have been the very ground upon which the trial court denied the motion. (*White v. Superior Court*, 72 Cal. 475; Hayne on New Trial and Appeal, §§ 14, 145.) And we think, in the absence of anything in the record showing a waiver, the objection by respondent should be sustained.

The judgment roll remains for consideration, and contains a bill of exceptions raising an objection to the introduction of certain testimony. It appears that plaintiff owned a certain piece of hay land, inclosed by a fence, which fence was out of repair. In defense to plaintiff's claim to the hay in question, defendant alleges an agreement whereby he claimed title to the hay in dispute, as follows: That early in the summer of 1891 plaintiff and defendant agreed "that defendant would repair the fence around said land in consideration for said grass on said land for the year 1891, and in pursuance of said agreement did repair the said fence around said land, and afterwards did, on the _____ day of September, 1891, go upon said land and cut said grass, and stacked the hay." Under that agreement defendant claimed title to the hay. Plaintiff, by replication, appears to admit the agreement set forth in the answer, by giving a slightly different version thereof, as follows: "But plaintiff alleges the fact to be that in the month of June, 1891, plaintiff told defendant that if he would repair said fence around said land so that plaintiff could have the use of said land thereafter, and the benefit of the second growth of grass thereon, he (defendant) might at that time cut the grass then growing upon said land; that said defendant did repair said fence, but neglected and refused to cut said hay according to said agreement; that, after a reasonable time had expired for said defendant to cut said hay under said agreement," plaintiff forbade defendant to cut said hay, or go upon said land for that purpose. Having thus admitted the agreement, according to

his version of it, and having admitted that defendant "did repair said fence," upon the trial, as shown by the bill of exceptions, plaintiff's counsel objected to any proof being received as to any agreement, because the agreement whereby defendant claimed said hay was not evidenced by writing, "and, being for an interest in land, is void under the Statute of Frauds." If this objection could be interposed at all, with any force as to the transaction set up in the answer, and admitted by the replication, it could not be interposed by plaintiff after he had solemnly admitted said agreement, according to his version of it, by verified replication.

The agreement in the case at bar did not require proof. Both parties alleged the existence of the agreement, and the terms of it, without substantial difference. The only issue raised appears to be whether defendant proceeded to cut the grass within a reasonable time. The language of plaintiff's replication implies that, by the terms of the agreement which he alleges, defendant was entitled to a reasonable time to carry out the agreement; for he alleges "that after a reasonable time had expired for defendant to cut said hay, under said agreement," plaintiff forbade defendant to cut said hay, or go upon said land for that purpose. From one point of view, this agreement might be regarded as a lease of said field on condition to make repair of the fence, and take the crop of hay in consideration therefor. The term of such lease was for part of a year only, according to the conditions stated, and such lease could be made by parol agreement. (Comp. Stats. div. 5, § 217.) Whether the agreement be regarded as a lease or a sale of the grass to be harvested as hay, there is no issue raised in the pleadings as to the fact of the parties having made the agreement, and the terms thereof. Both parties affirm the contract by solemn declaration in the pleadings, verified. Plaintiff declares in his replication "that said defendant did repair said fence." The only issue raised was as to what was a reasonable time within which defendant should perform the agreement admitted by the pleadings. The objection that said agreement, pleaded by both parties, must be shown by writing, was properly overruled, even if such objection could have had any force if the pleadings had raised an issue thereon—a

point upon which we express no opinion, because that question does not arise under the pleadings.

The jury found in favor of the defendant, and no error appearing from the bill of exceptions, or from other parts of the judgment roll, the judgment must be affirmed.

Affirmed.

BLAKE, C. J., and DE WITT, J., concur.

MCKAY, APPELLANT, v. MONTANA UNION RAILWAY COMPANY, RESPONDENT.

[Argued November 14, 1892. Decided December 31, 1892.]

Nonsuit — Verdict directed for defendant. — A judgment entered upon a verdict which was directed for defendant upon motion at the close of the introduction of both plaintiff's and defendant's testimony, upon the ground of want of sufficient proof on the part of plaintiff to support the material allegations of his complaint, is in effect a judgment of nonsuit and will be reviewed as such on appeal.

SAME — Practice — Directing verdict. — Where a defendant upon the failure of the plaintiff to prove a sufficient case for the jury, exercises his option to leave the case with the jury or the court for judgment on the merits, relying as well upon the proofs offered for the defense as well as upon the weakness of plaintiff's case, the decision in such event should not come from the jury, if there be one, by positive direction of the court, as such direction would leave the jury no power to render a verdict on the merits.

APPEAL — Nonsuit — Record on appeal. — The record on appeal from a judgment of nonsuit where proof was introduced by defendant should contain all of plaintiff's evidence, and if the defendant, by the proof which it saw fit to introduce, aided plaintiff or supplied any deficiencies in his proof, plaintiff would be entitled to have such testimony of defendant also made a part of the record.

SAME — Same — New trial — Bill of exceptions. — An order granting a motion for a nonsuit, if erroneously made, is an error in law occurring at the trial under section 296 of the Code of Civil procedure, and is subject to review on motion for a new trial, as well as on direct appeal; and a bill of exceptions is available to bring up the record on which the motion for a nonsuit was granted.

SAME — Bill of exception — Settlement — Notice. — Under section 5 of the Act of September 14, 1887 (Extra Sess.), the adverse party is entitled to notice of the presentation and settlement of a bill of exceptions prepared from the stenographer's notes after the trial, in order that he may have an opportunity to examine the proposed bill and offer or suggest amendments, and where such notice is not given the testimony contained in such bill of exceptions will upon motion be stricken from the record on appeal.

Appeal from Second Judicial District, Silver Bow County.

Action for damages for personal injuries. Judgment was

13	15
13	157
13	291
13	408
31*	999
22*	675
34*	38
34*	189
13	15
14	988
14	336
31*	999
36*	188
36*	317
13	15
15	179
15	556
15	586
31*	999
38*	833
38*	850
38*	906
13	15
18	254
18	255
18	257
19	50
19	453
13	15
21	126
13	15
26	441
13	15
30	384
13	15
41	24
41	572

entered on a verdict directed for defendant by McHATTON, J. On motion to strike testimony from the record on appeal. Granted.

J. S. Shropshire, for the motion.

W. I. Lippincott, contra.

HARWOOD, J.—It appears from the complaint in this action that while appellant was in the employ of respondent he received certain personal injuries, alleged to have been sustained through the negligent and careless conduct of defendant's agents and servants, and this action is brought to recover damages therefor. At the close of the trial, defendant moved the court to direct the jury to return a verdict for defendant, "for the reason that the testimony of plaintiff shows that he was assisting to propel the car in question, and that, whatever rate of speed it attained, he assisted therein, without objection or protest; that, if he was injured in the manner claimed he contributed thereto; and for the further reason that there is no testimony showing any actual neglect on the part of plaintiff's fellow servants." The motion was sustained, and the jury, being so instructed, returned their verdict accordingly; whereupon judgment was entered in favor of defendant, and plaintiff appealed from the judgment.

The present consideration relates entirely to a question of practice, arising on motion of respondent to strike from the record all that portion which purports to recite evidence introduced on the trial of the cause. As ground for this motion, respondent's counsel insists that such testimony has not been properly made a part of the record for the purpose of the review sought on this appeal, by statement on motion for new trial, or appeal, prepared, served, and settled as provided by law, nor by bill of exceptions prepared and settled and allowed as provided by law. The record upon which the appeal is presented is denominated "plaintiff's bill of exceptions," which includes, first, the pleadings upon which the trial was had, consisting of the complaint, answer, and replication. Following the pleadings is a narrative of what purports to be the testimony introduced on behalf of plaintiff and defendant, comprising about eighty pages of the record.

It appears in the narrative of the proceedings that at the close of the introduction of testimony on behalf of plaintiff, counsel for defendant said: "I had intended to move the court for a nonsuit at this stage, but I will reserve the right, after the close of our testimony, to move the court to direct a verdict for defendant." The record then recites the testimony offered by defendant by way of the examination of several witnesses, and the introduction of the deposition of one witness not present. When defendant closed the introduction of testimony, plaintiff was recalled, and testified in rebuttal. Then follows a statement that, the "testimony having been introduced, defendant moved the court to instruct the jury to return a verdict for defendant, which motion, after argument by counsel and consideration by the court, was by the court sustained, and it was ordered by the court that the jury return a verdict for the defendant; to which order of the court, sustaining the said motion, and ordering the jury to return a verdict as aforesaid, the plaintiff then and there duly excepted, and now, within the time allowed by the court, asks that this, his bill of exceptions, be signed and allowed, which is done accordingly. Signed this 19th day of July, 1892. J. J. McHATTON, Judge." At the close of the narrative of testimony is a certificate by the official court stenographer, to the effect that "the above and foregoing is a true, full, and correct transcript of my notes (in narrative form) of the testimony given at the trial of the above-entitled action in said court, to the best of my skill and ability."

It seems necessary, as the first step in the consideration of the question of practice raised herein, to classify the order of the court determining the case upon trial in favor of defendant. The Code of Civil Procedure defines the practice whereby an action is instituted, and carried on through all its stages to final determination. The Code has provided for cases "when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." The remedy prescribed for such an event is judgment of nonsuit. (Code Civ. Proc. § 242; *Garver v. Lynde*, 7 Mont. 108.) Defendant's motion in this case, at the close of the introduction of evidence, was based upon the ground of want of sufficient proof on the part of plaintiff to support the material allegations of his complaint. If that was the condition of

plaintiff's case when he closed the introduction of evidence on his behalf, there was no occasion for offering any proof on behalf of defendant. If plaintiff had made out such a case by proof as to require proof from defendant to rebut or counteract the tendency of plaintiff's proof, a nonsuit, or a positive direction to the jury to return a verdict for defendant, under such conditions, would be improper. If there was any occasion for proof from defendant to counteract the effect of plaintiff's proof, then thereby would be produced a conflict in the tendency of the proof offered from each side, and that conflict would be a matter for the jury to pass upon, in the exercise of its function in the trial. This would forbid a nonsuit, or an order directing the jury to return a verdict for defendant. Either determination in that manner is by the court, and proceeds, if correct, upon the ground that there is no sufficient proof offered by plaintiff in support of his complaint to put the jury upon the consideration of the question whether the complaint is established or no. Why, then, should the court require the jury to return a verdict for defendant? This order simply makes the jury the passive clerical agent of the court, to announce its conclusion that the plaintiff has failed to "prove a case sufficient for the jury;" and after all, such verdict being nothing more than the determination of the case by the court, on the ground which calls for nonsuit, we think it should be classified as a nonsuit.

The ground on which the court was asked to direct a verdict for defendant in this case was that plaintiff had failed to produce evidence tending to establish negligence on the part of defendant's agents and servants; moreover, that the proof offered by plaintiff tended to show that he, with some of his fellow laborers of equal rank, voluntarily, and without stress of circumstance, condition, or command, and unnecessarily, so far as any reason shown, propelled the hand car on which they were going to their place of work, down a grade, at a dangerous rate of speed, whereby plaintiff received the injuries complained of, while voluntarily engaged with the others in taking this adventurous ride, at such unnecessary and hazardous rate of speed, which plaintiff, without protest, helped produce by his own efforts at the car handles. If plaintiff's evidence tended to prove a state of facts contrary to the essential allegations of his

complaint, it failed in its tendency to establish the material allegations of the complaint, and such a condition is ground for nonsuit. (Code Civ. Proc. § 242.) These observations are not to be understood as holding it to be obligatory on the defendant, in such an event, to move for nonsuit. There is no doubt that he can exercise his option to leave the case with the jury or court if no jury is called, for judgment on the merits, relying on the weakness of plaintiff's case, as well as the proof offered by defendant. But the decision, in such event, should not come from the jury by positive direction of the court. Such direction leaves the jury no power to consider and render a verdict on the merits. (*Wood v. Ramond*, 42 Cal. 643.) The practice of ordering a verdict for defendant in a civil action, where plaintiff fails in the required proof to sustain his case, has doubtless crept into the civil practice from the procedure in criminal cases, where the doctrine of jeopardy and the presumption of innocence are powerful factors in shaping the practice in that branch of the law. The determination of this case being in effect a nonsuit, based upon the ground that there was a want of proof on the part of plaintiff, a review of that order will undoubtedly require a review of at least all the evidence introduced by plaintiff; and plaintiff may take advantage of evidence introduced by defendant, for if defendant, by the proof which it saw fit to introduce, aided plaintiff, or supplied any deficiencies in his proof, plaintiff is entitled to the benefit thereof on motion for nonsuit.

The question raised is whether the record of the evidence introduced on the trial has been so prepared as to place the same properly before this court for such review, to consider whether the court was right in its summary determination of the case. In presenting this question, considerable argument was had as to whether the proceedings resulting in a nonsuit could be properly classified as a "trial;" and thereon hangs the further question whether the ruling of the court in ordering a nonsuit could be reviewed on motion for a new trial, or whether it must be reviewed on appeal from the judgment, with a statement of the case on appeal, bringing up the record on which the motion was granted, and whether a bill of exceptions was available to bring up the record on which the nonsuit was granted. The opinion delivered in the case of *Kleinschmidt v.*

McAndrews, 4 Mont. 8, was the source of much embarrassment to counsel in seeking satisfactory answer to these questions, for it appears to be held in that case that the proceedings resulting in a judgment of nonsuit for want of sufficient evidence cannot properly be denominated a "trial," in the sense of that term as used in the statute providing for new trials, and therefore that such determination cannot be reviewed on motion for new trial, for such motion is directed to the re-examination of an issue of fact, "after a trial and decision by a jury, court, or referees." It was further held in that case that a bill of exceptions was not available to bring up the record on which motion for nonsuit was granted, because the exception under the statute was to be taken during the trial, and that, in the nature of things, the exception to the granting of a nonsuit could not be taken during the trial.

In respect to these propositions announced in *Kleinschmidt v. McAndrews*, it suffices to observe, in passing, that since that decision, at the January term, 1881, of the Supreme Court of Montana, the statute providing for new trials has been amended by adding three subdivisions to section 296 of the Code of Civil Procedure, so as to allow a new trial on the ground of "excessive damages;" "insufficiency of evidence to justify the verdict, or other decision, or that it is against law," and "error in law occurring at the trial and excepted to by the party making the application." This amendment was approved in February, 1881, and of course had no effect on the case of *Kleinschmidt v. McAndrews*. In California, under a like statute for new trials, an order granting a motion for nonsuit is held to be an "error in law occurring at the trial," if erroneously made, and is subject to review on motion for new trial. It is also there held that the granting of nonsuit may be reviewed on an appeal from the judgment, by bringing up the proper record with the judgment roll. (Hayne on New Trial and Appeal, §§ 100, 112-119 inclusive, and cases cited.) It should also be further observed that *Kleinschmidt v. McAndrews* was overruled on appeal to the Supreme Court of the United States, at least as to its application of the rules of practice laid down in that case (117 U. S. 282), the Supreme Court of the United States holding that the case was properly brought before the Supreme

Court of Montana by the bill of exceptions in the record, and should have been reviewed on the merits. And it must be borne in mind that, since that case was determined, a statute has been enacted providing for the preparation, settlement, and allowance of bills of exceptions from the stenographer's notes, after the trial, as will be noticed below.

It is unnecessary to consider all the questions of practice propounded in the argument, and therefore a treatment of them here might justly be open to the criticism of being *dictum*. Reference is made to the case of *Kleinschmidt v. McAndrews*, and the changes in the law since made, in order to explain its seeming variance with what may be held in subsequent cases. We therefore proceed to the consideration of the precise question raised here, namely, whether the bill of exceptions tendered in this record has been prepared, settled, and allowed in the manner provided by law. On the argument of the motion under consideration, counsel for respondent complained that no notice or knowledge of the preparation, presentation, or settlement of the bill of exceptions set out in the record came to respondent or its counsel until after the bill of exceptions had been prepared and signed, and the notice of appeal was served, which knowledge was gained through an examination of the record presented on appeal. This statement was not questioned on the argument of the motion, nor is there anything in the record showing the contrary. The bill of exceptions in the record is prepared from the stenographer's notes after trial. The insertion of the pleadings in such bill was superfluous, as the pleadings constitute part of the judgment roll, and are properly part of the record on appeal from the judgment, without being incorporated in a bill of exceptions. As a bill of exceptions prepared from the stenographer's notes after the trial, the bill tendered in this case does not conform to the requirement of the statute providing for the preparation, settlement, and allowance of a bill of exceptions from the stenographer's notes, after the trial, as follows: "The said stenographer, during the trial of any action or proceeding, shall write down in stenographer's notes all objections and exceptions taken, and thereafter a transcript of such notes, or so much thereof as may be pertinent to the point of such objection and

exceptions, may be embodied in a bill of exceptions, and signed by the judge at any time during the same term of court, or within ten days thereafter, on notice to the attorney of the adverse party, if he have one, otherwise to such adverse party; and an exception so noted by the stenographer, and thereafter embodied in a statement of the case, on the minutes of the court, shall be a good exception for all purposes, in all cases, civil or criminal." (Laws Extra Sess. 1887, p. 82, § 5.) This statute requires notice to the adverse party of the presentation and settlement of such bill of exceptions. Such notice was undoubtedly intended to enable the adverse party to examine the proposed bill, and be heard in the settlement thereof, to the end that the case presented on appeal for review shall conform fully and truly to the case passed upon by the court below. When a bill of exceptions is settled during the trial, the adverse party has such opportunity (*Wetherbee v. Carroll*, 33 Cal. 552), and this statute provides therefor, in case it is settled from the stenographer's notes after the trial. In California, by provision of the Code adopted since the case of *Wetherbee v. Carroll* was decided, a bill of exceptions prepared and settled after the trial must be prepared and served on the adverse party or counsel, who may offer amendments, and thereafter the bill is settled by the judge, on notice to the parties, very much in the manner provided in our Code for the settlement of a statement on motion for new trial. (Hayne on New Trial and Appeal, §§ 256-260.) Our statute has not so explicitly provided the details of practice for the settlement of a bill from the stenographer's notes, after trial, but has provided for notice to the adverse party, and left the court or judge to control the details of practice in such a way as to enable the adverse party to examine the proposed bill, and offer or suggest amendments; otherwise, the notice required by statute would be in vain. However faithfully a stenographer endeavors to transcribe a voluminous transcript of testimony, delivered by questions and answers, and at the same time render the meaning of the witnesses in narrative form, mistakes may occur. The stenographer may conceive the meaning quite different from what the witness intended, and different from what was understood by the court, jury, or counsel, and thus unconsciously make the narrative depart from the

true meaning of the witness. For these reasons the adverse party should have an opportunity to carefully examine the narrative of the evidence proposed to be presented to the appellate court for review on appeal, and be given an opportunity to suggest amendments to make the same conform to the true meaning of the witness. The law has not been complied with in preparing the record of evidence presented in this case, and therefore we are of opinion that the motion to strike the same from the record on appeal should be sustained; and it is so ordered.

Motion granted.

BLAKE, C. J., concurs.

STATE EX REL. LEECH v. BOARD OF CANVASSERS
OF CHOTEAU COUNTY.

[Argued December 28, 1892. Decided December 31, 1892.]

13	23
17	304
17	501
13	23
23	135
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23	35
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32	10

MANDAMUS—Issuance in vacation by one justice of Supreme Court.—An alternative writ of mandate may be issued in vacation upon the order of the presiding justice of the Supreme Court. (DE WITT, J., dissenting.)

SAME—Original jurisdiction of Supreme Court to issue.—The Supreme Court has original jurisdiction to issue a writ of mandate. (*State ex rel. Thompson v. Kenney*, 9 Mont. 228; *In re MacKnight*, 11 Mont. 126, cited.)

SAME—To whom directed—Elections—Returning board.—Under the Act of March 7, 1892 (2d Sess. p. 299), the members of a county board of canvassers do not necessarily embrace the same officers, but are subject to changes which depend upon circumstances, and therefore, a writ of mandate issued to compel such board to reconvene and canvass the returns from an election precinct which they had excluded, is properly directed to the particular individuals comprising the board, describing them by name, and as constituting the board of county canvassers of election returns for a certain county and State, the particular members of such board at the time in question being the persons against whom obedience must, if necessary, be enforced.

SAME—Alternative writ—What required to state.—An alternative writ of mandate which states generally the acts which the parties have omitted to do, and which they are required to perform, is sufficient under section 586 of the Code of Civil Procedure, providing that the writ shall state generally the allegation against the party to whom it is directed. The word "generally" having the same meaning as the word "general" in section 68 of the Code of Civil Procedure, requiring the summons to contain the "general nature of the action."

ELECTIONS—Returns—Canvassing board—Mandamus.—The duties of a county canvassing board are ministerial, and such board has no authority to exclude the returns of an election precinct, regularly made, upon the ground that the voting was shown by affidavits to be illegal, and having done so may be compelled by mandamus to canvass such returns. (*Pigott v. Board of Canvassers of Cascade County*, 12 Mont. 587; *Ohumasero v. Potts*, 2 Mont. 270, cited.)

SAME — Canvassing board — Adjournment sine die — Mandamus.— Where a county canvassing board issued a certificate of election to a candidate for the legislative assembly after unlawfully excluding the returns of a particular precinct, and then adjourned *sine die*, such board may be compelled by mandamus to reconvene and canvass the returns so excluded, and issue a certificate of election to the person shown by a complete canvass to be entitled thereto.

MANDAMUS — Answer to alternative writ — Defenses.— A county canvassing board in its answer to an alternative writ of mandate issued to compel such board to canvass the returns of a particular precinct which it had excluded, is not confined to the reason incorporated in the official record of its proceedings as ground for excluding such returns, but may specify other defenses.

ELECTIONS — Canvassing board — Defects in returns — Mandamus.— Where the genuineness and regularity of the returns of an election precinct were not questioned by the county canvassing board at the time of making the canvass, but such returns, having been received through the proper course of the mail, were treated at the time as worthy of full credit, and the names of the candidates for members of the legislative assembly and the number of votes received by each at such precinct could be readily ascertained by such board upon an inspection of the poll-book, but which returns were excluded by such board for a reason not apparent on its face, it is no defense to an alternative writ issued in a mandamus proceeding to compel the board to canvass such returns, that the blank return in such poll-book was not filled in nor the certificate thereto properly attested, as such defects would not have been grounds for rejecting the returns. Section 5 of the Act of March 17, 1891 (Laws 2d Sess. p. 301), providing in substance that a failure to fill out all the certificates in a poll-book, or a failure to perform any other act in the making up of returns that is not essential to determine for whom the votes were cast, is not such an irregularity as to entitle the board to reject the same.

SAME — Same — Mandamus — Answer to writ.— An allegation in an answer to an alternative writ of mandate, issued to compel a county canvassing board to canvass the returns of a precinct which it had excluded, stating that it appeared from an inspection of the registration list, and of the list of persons returned as voting at said precinct that sixteen names of persons, naming them, appeared upon the list of persons returned as voting at said precinct, which said sixteen persons did not appear to have ever been registered as voters at said precinct, and no surrendered certificates of registration were transmitted by the judges of election to the clerk of the board of county commissioners in connection with, or as a part of the election returns of said precinct, or in any manner whatever, and it appeared from said returns that said sixteen persons were not entitled to vote at all at said election, presents an issue which should be tried.

SAME — Check lists and registry certificates — Canvassing board.— Although no check lists of such precinct or surrendered certificates were ever sent to the county clerk by the judges of election, it was the duty of the board of canvassers to have procured the check lists and such certificates before rejecting the vote of the precinct as returned by the poll-book alone.

SAME — Registration — Voting — Misplaced names.— No illegal votes were shown by the returns to have been cast at such precinct where it appeared that the check list contained the names of forty-six voters, five of whom failed to vote; that five electors voted upon county registry certificates, and that the list of voters returned by the poll-book consisted of forty-six names, in sixteen of which there occurred some difference in the spelling of the names as written by the registry agents and by the clerks of election, or a difference occurring by way of using initial letters for the Christian name in one case and writing it at length in the other, or the dropping of an initial, but each of which names could be identified with a name upon the check list.

Original proceeding. Application for alternative writ of mandate to compel the county board of canvassers of Choteau County to reconvene and canvass and count the election returns from Box Elder Precinct and to deliver to relator a certificate of his election as a member of the legislative assembly.

Decius S. Wade, and Ella L. Knowles, for Relator.

John W. Tattan, Robert B. Smith, and George F. Shelton, for Respondent.

BLAKE, C. J.—This is an application to the court for the issuance of a writ of mandate to the board of canvassers of the county of Choteau, in this State, directing the board to reconvene and canvass and count the election returns from the Box Elder Precinct, No. 18, in said county; and also commanding said board, and the county clerk of said county, to deliver to the relator, Eugene E. Leech, a certificate of his election as a member of the legislative assembly of the State for said county. The affidavit of said Leech says that he is a resident of said county, and above the age of twenty-five years. That on the eighth day of November, A. D. 1892, there were two vacancies in the office of members of the House of Representatives of the legislative assembly of the State for said county. That the relator was a candidate for this office, at the general election held in said county on the said eighth day of November, and was nominated, certified, and published for such office, and received a plurality of the votes cast by the qualified electors of said county. That on the nineteenth day of November, A. D. 1892, Charles W. Gray and Edward Dunne were county commissioners of said county, and that the third member of the board of county commissioners did not attend, and Walter J. Miner, the county treasurer of said county, acted with said Gray and Dunne as members of the canvassing board of said county. That said board of canvassers were in session from the said nineteenth day of November until the twenty-third day of said month, and then adjourned. That the return of the precincts in said county in which the polls were open were in legal form, and were presented and received by the board of canvassers. That at said election the following per-

sons were candidates for members of the legislative assembly for said county: Thomas C. Burns, Eugene E. Leech, Albert B. Hamilton, and George T. Sanderson. That, as shown by said returns, and in fact, said Burns received eight hundred and twenty-seven votes; that said Leech received seven hundred and thirty-two votes; that said Hamilton received seven hundred and twenty-five votes; and that said Sanderson received five hundred and sixty-three votes; and that the returns of said votes were regularly made, submitted, and presented to said board of canvassers. It is further stated that said board proceeded to canvass and make an abstract of the votes cast, as returned, for the candidates of the legislative assembly; that said abstract, which is fully set forth, shows that the relator and said Burns and Hamilton and Sanderson received the number of votes above specified; that thereafter, and before the final adjournment of said board, a protest by said Hamilton, and four affidavits relating to said precinct No. 18, were presented; that said board thereupon excluded the returns from said precinct, and refused to canvass and count the same, but executed and signed another abstract of returns and votes cast in said county, exclusive of said precinct; that at said precinct the relator received twenty-nine votes, and said Hamilton received fourteen votes; that by the exclusion of said precinct said Hamilton appears to have received a majority of seven votes in said county over the vote cast for the relator; and that, with the returns of said precinct canvassed according to law, the relator received a majority of seven votes over said Hamilton. It is further stated that said returns from said precinct No. 18 were made in the proper manner and time, and in legal form; that the relator became and is entitled to receive from said board of canvassers and the county clerk of said county a certificate of election to the office of member of the legislative assembly of the State of Montana for the county of Choteau; and that said board and clerk have failed and refused to make, execute, and deliver to the relator the certificate of his election to such office.

The protest of said Hamilton alleges, in substance, that a judge of the election in said precinct No. 18 bribed the electors thereof; that at least twenty-five half-breeds voted at said pre-

cinct; that it is a "fair conclusion, from the facts presented, that every one of them were bribed to vote the Republican ticket; and that, left to themselves, they would have voted the Democratic ticket; wherefore your protestant demands that the returns from said precinct be set aside, and rejected as wholly unworthy of a place in your returns." The affidavits of John B. Trottier, Isador Trottier, and Elias Shongray are similar in form. It is deposed therein that each affiant is a half-breed, and unable to read and write; that a certain judge of the election fixed their respective tickets at the polls, and gave a card to the affiants; that another party paid ten dollars to the bearer upon the receipt of this card; and that the affiants consider or believe that this money was paid for voting the Republican ticket. The affidavit of Simon Pepin is to the effect that he was informed, and fully believes, that each half-breed who voted the Republican ticket at said precinct at said election received therefor the sum of ten dollars. The affidavit of said Hamilton is to the effect that he has made many inquiries, and believes that twenty-five half-breeds voted at said precinct at said election; that he has conversed with a number of them, and "believes that all the half-breeds that voted there were paid ten dollars each to vote the Republican ticket."

It appears from the record of the proceedings that the said board of canvassers, after the filing of the protest of said Hamilton and said affidavits and the argument of counsel, "decided to strike out and not canvass the returns from said precinct;" that the members signed the abstract of election returns which was made out in accordance with this decision; that it was declared that the persons named in said abstract, who received the highest number of votes, were "duly elected;" and that said Minar and Dunne "constituting a majority of the canvassing board, together with Alfred E. Rodgers, clerk, proceeded to sign the certificates of election of the persons receiving the highest number of votes for their respective offices, as set forth in the abstract."

The writ of mandate in the alternative was issued and served upon the members of said board of canvassers. The respondents, on the day when they were directed to appear and show cause before this court, filed a motion to quash the writ, upon

the ground that the same had been issued by an order of the chief justice in vacation. During the past twenty years there has not been any amendment to the statutes which would affect this question of procedure. The practice which has prevailed in the Supreme Courts of the Territory and State was followed, and the usual order was made by the presiding justice upon the application, for the purpose of securing a hearing and determination of the controversy by this court. The motion is therefore overruled. The respondents then filed a demurrer to the alternative writ, upon the grounds which will be hereafter examined.

It is asserted that this court has no original jurisdiction to issue the writ of mandate to afford the relief which is sought by the relator. We have given this subject a thorough consideration, and adhere to the view announced in *State v. Kenney*, 9 Mont. 223; and *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451. The respondents maintain that the writ "is directed to certain individuals, and not to the board of canvassers." The following language is used: "The State of Montana to Charles W. Gray, Edward Dunne, and Walter J. Minar, constituting the board of county canvassers of election returns for the county of Chouteau, State of Montana, and Alfred E. Rodgers, clerk of the board of county commissioners, and *ex officio* clerk of the said board of county canvassers, greeting." The statute provides that the "alternative writ shall state generally the allegation against the party to whom it is directed, and command such party to do the act required to be performed, or to show cause." (Code Civ. Proc. § 568.) The law creating the board of county canvassers contains this section: "The board of county commissioners of each county is *ex officio* a board of county canvassers for the county, and must meet as a board of county canvassers at the usual place of meeting of the board of county commissioners; and if at the time and place appointed for such meetings one or more of the county commissioners should not attend, the place of absentees must be supplied by one or more of the county officers whose duty it is to act, in the order named, to wit, the treasurer, the assessor, the sheriff, so that the board of county canvassers shall always consist of three acting members. The county canvassing board, so constituted, shall

meet at the office of the county clerk of such county within ten days (Sundays excepted) after each election held under the laws governing general and special elections in this State, to canvass the returns; and the clerk of the board of county commissioners is the clerk of the board of county canvassers." (Stats. 2d Sess. p. 299, § 2.) The duties of the members of the board and its clerk are specifically defined, and the writ states "generally" the acts which the parties have omitted to do, and which they are required to perform. Under the statute, *supra*, the members of the board of county canvassers did not embrace the same officers, but are subject to changes, which depend upon circumstances. At one time they may include the county commissioners, and at another time the treasurer, assessor, or sheriff may be compelled to supply the places of the absentees. In *State's Attorney v. Selectmen of Branford*, 59 Conn. 409, the court said: "The writ must be directed to those, and those only, who are to obey it. This is necessary, so that, in case the demand is disobeyed, it may be certain who is to be proceeded against for the contempt." In *Coll v. City Board etc.* 83 Mich. 367, the writ was directed to the city board of canvassers of election "and A. G. Kronberg, city clerk of the city of Detroit." It appears from the opinion that the "respondents, composing the board of canvassers, by a vote of thirty-four to twenty declared" certain candidates elected. It is also stated that "each member of the canvassing board is made a party respondent to this proceeding." In *Brown v. Commissioners*, 38 Kan. 436, the alternative writ was directed to the county commissioners and county clerk as a board of canvassers. Mr. High reviews the authorities upon this subject, and says: "In cases of mandamus to subordinate courts, to set them in motion, and to compel action upon matters properly within their jurisdiction, on which it is their duty to act, it would seem to be correct practice to direct the alternative writ, either to the court as such, or to the individual judges of whom it is composed. But the direction should be to the particular judge or judges of the court when there are other judges authorized by law to hold the terms of the court, that it may be known against whom the authority to enforce obedience to the writ shall, if necessary, be exercised." (High on Extraordinary Remedies [2d ed.], § 544.) These principles are appli-

cable to the facts before us. The statute does not designate the name by which the board of county canvassers shall sue or be sued, and the direction of the alternative writ is to the particular members of this board, and its clerk, against whom obedience must, if necessary, be enforced. The doctrine of the old authorities respecting the contents of the alternative writ of mandamus has been modified by the Code of Civil Procedure, and the allegation is to be stated "generally," and not specifically. The term "generally" seems to have the same meaning as the word "general" in the Code, which requires the summons to contain the "general nature of the action." (§ 68.) We are satisfied that this writ complies substantially with the statute, *supra*, and that the respondents are thereby notified of the wrongs of which the relator complains, and the relief which he demands.

It is contended, however, that a discretion has been vested in the respondents, and that the writ of mandamus cannot, for this reason, be issued. In the recent case of *Pigott v. Board of Canvassers of Cascade Co.* 12 Mont. 537, we decided this point, and held that the duties of respondents are ministerial, under the following sections of the statute: "The canvass must be public, by opening the returns, and determining therefrom the vote of such county or precinct for each person voted for, and for and against each proposition voted upon at such election, and declaring the result thereof." (Stats. 2d Sess. p. 301, § 4.) "In canvassing the returns of the several precincts in the county by the county canvassing board, no return shall be rejected if it can be readily ascertained therefrom the number of legal votes cast for each person named therein." (Stats. 2d Sess. p. 301, § 5.) "The clerks shall set down in their poll-books the names of every person voted for, and, at full length, the office for which such person received such votes, and the number he did receive, the number being expressed at full length; such entry to be made, as near as circumstances will admit, in the following form." (Comp. Stats. div. 5, § 1030.) One of the poll-books of the precinct is comprised in the returns. (Comp. Stats. div. 5, § 1031.) Mr. Justice Knowles, in his concurring opinion in *Chumasero v. Potts*, 2 Mont. 270, expresses tersely our conclusions, and it is needless to multiply authorities thereon: "Much might be said in relation to the issues presented in this

proceeding. There are a large number of issues tendered in the answers that go to the point that there was a fraudulent and illegal vote cast upon the subject of the approval of the capital law. This is a question that the canvassers of the return of the abstracts of the votes had nothing to do with. It was no part of their duty to determine what was the true and legal vote cast. What they were required to do was to determine what the abstracts of the vote returned to them showed upon this subject. As they have no right to go behind these abstracts, they have no right to assign as a reason for not canvassing the true abstracts that there was an illegal and fraudulent vote behind them."

We have no hesitation in holding that the foregoing affidavits were received by the respondents without legal authority, and the exclusion of the returns from said precinct upon this ground was invalid.

The next contention in support of the demurrer is that this court does not possess the power to compel the respondents to hold another session after they have adjourned *sine die*, and recanvass the returns of said election, and issue a certificate of election to the relator. It appears that said Hamilton has been declared elected a member of the House of Representatives of the legislative assembly, and that the certificate of his election has been issued by the respondents. This is, in the main, a new question for our tribunal, but there are many adjudications in other courts upon these propositions. We have examined the authorities which uphold the theory of respondents, and cite them without indulging in extensive comments: *Clark v. Buchanan*, 2 Minn. 346; *State v. Stewart*, 26 Ohio St. 216; *State v. Rodman*, 43 Mo. 256; *People v. Supervisors etc.* 12 Barb. 217; *Sherburne v. Horn*, 45 Mich. 160; *People v. Cover*, 50 Ill. 100; *Oglesby v. Sigman*, 58 Miss. 502; *Myers v. Chalmers*, 60 Miss. 772; *O'Hara v. Powell*, 80 N. C. 103; *Swain v. McRae*, 80 N. C. 111. The weight of judicial authority, and the sound rule for our guidance, are in conflict with these positions. In *Ellis v. Commissioners*, 2 Gray, 370, the writ of mandamus was held to be the appropriate remedy for the relator, although another candidate had been declared to be the county treasurer, and was in possession of the office. In

People v. Rives, 27 Ill. 241, it was adjudged to be no defense to the petition for mandamus that a certificate of election had been issued, and that the governor had commissioned the competitor of the relator a justice of the peace. In *Brown v. Commissioners*, 38 Kan. 436, the board of canvassers refused to count seventeen votes from one township for the relator, and declared that another person had received a majority of the votes cast for county commissioner in the district, and issued a certificate of election accordingly. The board was commanded to count this vote upon the face of the returns, and determined that the relator had been elected, and issued to him a certificate of election. In *State v. Wilson*, 24 Neb. 139, it was decided that the writ of mandamus should issue, although certain school trustees had received their certificates of election, and had qualified and entered upon their duties. In *State v. Howe*, 28 Neb. 618, this ruling was approved in a mandamus proceeding concerning the office of justice of the peace. In *Smith v. Lawrence*, South Dakota, June 19, 1891, 49 N. W. Rep. 7, the court reviewed at length similar questions, and arrived at the same result, where the party had received the certificate of his election as sheriff.

There are two leading cases, which should be carefully weighed, because they affect members of the legislature: In *O'Ferrall v. Colby*, 2 Minn. 180, decided in the year 1858, Chief Justice Emmett, for the court, said: "Another position urged by the defense is that, as by the Constitution the senate is made the judge of the election and eligibility of its members, no other tribunal can or ought to take jurisdiction of this case. This position, we think, is sufficiently answered by the fact that this is not a proceeding to try the right of any party to the office of senator, but simply to determine whether the plaintiffs are entitled, at the hands of the defendant, to certificates of election to that office. Nor can our decision in the least affect the question of the election of either of the candidates. That question can be definitely settled by the senate alone. The aid of this court is sought to prevent the consequences of a usurpation of authority on the part of this board of canvassers, and to compel the defendant to do his duty. All that we can do is to arm the parties entitled with the credentials necessary to enable

them properly to assert their rights before the proper tribunal. Whether they, or either of them, were legally elected, is not a question here. One candidate may be entitled to a certificate of election, while his opponent may have a clear right to the office." In *People v. Hilliard*, 29 Ill. 413, decided in the year 1862, Mr. Justice Breese, for the court, said: "Though the House of Representatives is the sole and exclusive judge of the qualifications of its members, this application has no reference whatever to the point of qualifications. Its sole purpose is to procure the requisite evidence, to present to that body, of a *prima facie* right to a seat in it, independent wholly of the question of qualification. It is clear, then, the appropriate remedy is not with the House of Representatives. The only remedy the relator has—the only means by which he can obtain evidence of the right claimed—is by this compulsory writ of mandamus. This is very clear. No other process or proceeding can give the specific relief in the premises. But it is urged that, as the certificate has already issued, the office is filled, and therefore the only remedy is by a contest before the house. Some cases are referred to in support of this position, but it will be seen most of them were applications for a mandamus to admit to an office. This is not such a case. The relator asks not to be admitted to an office, but that evidence of his having been elected to an office shall be furnished him. It is not to turn one man out and put the relator in office that this proceeding is had. A mandamus will not lie for such purpose, and a decision in this case cannot affect the right of another claiming the office. That is for the House of Representatives to determine." (See, also, *State v. County Judge*, 7 Iowa, 186; *Clark v. McKenzie*, 7 Bush, 523; *Alderson v. Commissioners*, 32 W. Va. 454; *Lewis v. Commissioners*, 16 Kau. 103; 22 Am. Rep. 275; Paine on Elections, § 919; Merrill on Mandamus, § 185; McCrary on Elections [3d ed.], § 350.) Judge Cooley, in his treatise on Constitutional Limitations, observes: "But we should think the better doctrine to be that, if the board adjourn before a legal and complete performance of their duty, mandamus would lie to compel them to meet and perform it." (Cooley on Constitutional Limitations [4th ed.], p. 785.) Judge McCrary says: "Thus it has been held by the Supreme Court

of Kansas that, where a board of canvassing officers has adjourned after making only a partial canvass of the votes cast, mandamus will lie to compel them to reassemble, and complete the canvass. Upon this question the authorities are not uniform. In New York and Ohio there are decisions holding to some extent the contrary doctrine. But the ruling in the Kansas case is supported by the Iowa decisions. And we think the reasoning of the Supreme Court of Kansas is sound." (McCrary on Elections, p. 156, § 234.)

The demurrer was overruled, and the respondents filed their answer. The relator demurred thereto, and also moved that a peremptory writ of mandate be issued, upon the ground that the answer did not state a good cause for the refusal of respondents to canvass and count the returns from the Elder Box Precinct. We have been embarrassed by the lack of precedents upon a question of pleading. It should be observed that the reasons which controlled the respondents in rejecting the returns from this precinct are set forth in the foregoing protest of said Hamilton, and the accompanying affidavits. They are incorporated in the official record of their proceedings, which is before us. Their attorneys do not justify the action of respondents upon this ground, or offer any excuse of a similar character, but specified in the answer several defenses, which are different from what were relied on by the canvassing board. Are the principles which are applicable to ordinary cases to be followed in this proceeding? Mr. Justice Swayne, in *Railway Co. v. McCarthy*, 96 U. S. 267, for the court, said: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (See, also, *Fisk v. Cuthbert*, 2 Mont. 593, and *Newell v. Meyendorff*, 9 Mont. 254; 18 Am. St. Rep. 738.) We do not think, however, that the respondents are confined, upon this hearing, to the foregoing reasons. They are required at this time to show cause why they have not done certain acts, and their defenses are thereby enlarged, and cannot be pleaded subject to limitations, which will be pointed out.

It is averred in the answer that the returns from this precinct were not properly certified by the judges and clerks, and that they omitted to fill the following blank in the poll-book:—

“Official Return. At an election held at the _____ house of _____, in _____ Precinct, in _____ County, and State of Montana, on the _____ day of _____, A. D. 189—, the following named persons received the number of votes annexed to the names of the following described offices.”

This document, which was received through the mail by the county clerk of Choteau County, and was before the respondents, is entitled as follows:—

“Poll-book of an election held in Box Elder Precinct, in Choteau County, State of Montana, on the eighth day of November, A. D. 1892, at which time Jno. Henry, David Adams, and A. M. Brough were judges, and Clem Sailor and J. P. Carberry were clerks, of said election, the following named persons voting thereat.”

The poll-book contains the oaths of the judges and clerks of election, which were duly subscribed November 8, 1892. The names and numbers of the electors were entered therein by the clerks, and the tally sheets are also recorded. The certificate at the end is in the following form:—

“Certified by us this eighth day of November, A. D. 1892.

Attest:

J. P. Carberry, } Clerks of
Clem Sailor, } election.

A. M. Brough, } Judges of
John Henry, }
David Adams, } election.”

The statute provides for the return and certificate:—

“At an election held at the house of A. B., in the township or precinct of _____, in the county of _____, and the State of Montana, on the _____ day of _____, A. D. 18—, the following named persons received the number of votes annexed to their respective names for the following described offices, to wit:—

Certified by us.

Attest:

A B }
and } Clerks of election.
C D }

M N }
O P } Judges of election.
Q R }

(Comp. Stats. div. 5, § 1030.)

The mistake in the certificate in this poll-book in the use of the word "attest" occurs in the principal blanks which were furnished to the officers of the precinct by the county. The legislative assembly, at its last session, enacted that such defects should not be grounds for rejecting the returns. "The fact that the returns do not show who administered the oath to the judges of election, or a failure to fill out all the certificates in the poll-book, or a failure to do or perform any other act in or about the making up of the returns that is not essential to determine for whom the votes were cast, shall not be such an irregularity as to entitle the said board to reject the same, but the same must be canvassed as other returns are canvassed." (Stats. 2d Sess. p. 301, § 5.) "If all the returns have not been received, the canvass must be postponed from day to day, until all the returns are received: provided that, if the returns from any of the election precincts have not been received by the county clerk fifteen days after such general or special election, it shall be the duty of the said board of canvassers to forthwith send a messenger to the judges of such election precincts, whose duty it shall be to open the ballot-box, and from the returns therein inclosed make a copy of the same, and furnish the messenger with such copy." (Stats. 2d Sess. p. 300, § 3.) The respondents did not appoint a messenger to perform this duty, but treated the returns of Box Elder Precinct as worthy of full credit respecting their contents. The genuineness and regularity of these documents were never questioned or attacked until this answer was filed. The names of the candidates for the House of Representatives of the legislative assembly, and the number of votes which was received by them at this precinct, can be readily ascertained by the board of canvassers upon an inspection of this poll-book.

This allegation appears in the answer: "That it appeared from an inspection of the registration list, and of the list of persons returned as voting at said Box Elder Precinct No. 18, that sixteen names of persons, to wit, Henry F. Schwartz, Henry Brough, John B. Trottier, William Trottier, Frank Trottier, Antoine Trottier, Andre Trottier, John Trottier, Ermine Trottier, J. B. Moture, W. H. Murray, L. K. Devlin, Isadore Trottier, Samuel Pepin, and J. B. La Framboise,

appeared upon the list of persons returned as voting at said Box Elder Precinct, which said sixteen names did not appear to have ever been registered as voters at said precinct; and no surrendered certificates of registration were transmitted by the judges of election to the clerk of the board of county commissioners in connection with or as a part of the election returns of said precinct, or in any manner whatever; and it appeared from said returns that said sixteen persons were not entitled to vote at all at said election." It is easily understood that cases may arise in which it would be the duty of the board of canvassers to compare the names upon the check lists with those of the actual voters. This course might be the sole remedy if a precinct with a small number of electors returned a large number of votes for candidates for office, exceeding the registration lists. It is difficult to prescribe a rule which would govern all controversies of this kind. An extreme illustration of the danger to be guarded against is shown by the remarkable case of *State v. Stevens*, 23 Kan. 456; 33 Am. Rep. 175. Mr. Justice Brewer, for the court, said: "The defendants, for one ground of defense, return that there were only about eight hundred legal voters in said county at the date of said election, whereas the returns as made show a vote of two thousand nine hundred and forty-seven purporting to have been polled, and that therefore at least two thousand one hundred and forty-seven of such votes were fraudulent and illegal, and that by reason thereof it is impossible to determine and declare the will of the people, or the true result of such election." It was adjudged that these facts constituted a defense to the proceeding for a mandamus to compel the canvassing board to declare the result of the election in accordance with such returns. A majority of the court is of opinion that, when the pleadings are reviewed, this paragraph of the answer presents an issue which should be tried.

The demurrer and motion of the relator were overruled, and the case was heard upon its merits by the court without a jury. The testimony will be presented in connection with the legal propositions which have been argued by counsel. It was proved that no check lists of the precinct, or surrendered certificates, were ever sent to the county clerk, and that the board of canvassers acted upon the poll-book alone.

In passing upon the demurrer and motion of the relator, we were obliged to review, as admitted, this portion of the answer: "That there was returned with said pretended returns, and as a part thereof, a list of the persons registered at said Box Elder Precinct No. 18." This allegation is contradicted by all the witnesses, including one of the respondents, who verified the answer. There was posted in the office of the county clerk the "verified copy" of the list of electors who had been registered in the Box Elder Election Precinct. (Stats. 16th Sess. p. 129, § 9.) The vote from Box Elder Precinct was canvassed, and then rejected, without an examination being made of said list. It is contended by respondents that the surrendered certificates should have been forwarded to the county clerk by the judges of this election precinct. Conceding that this contention is correct, although the statute is not perspicuous upon this point, it was the plain duty of the board of canvassers, under the statute, *supra*, to procure the checks lists, and such certificates, before the returns were rejected. What, then, appears upon the face of these returns which the respondents should have had before them as to the names of persons alleged not to have been registered? The following table shows such names of the electors as they appear upon the voting list, in the poll-book, and upon the check list and surrendered certificates of the Box Elder Precinct:—

NAMES OF VOTERS AS SHOWN BY THE POLL-BOOK.	LIST OF VOTERS AS REGIS- TERED AND SHOWN IN THE CHECK LIST.
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Henry F. Swartz.	Henry F. Schwartz.
Henry Brough.	Henry S. Brough.
John B. Trottier.	John B. Trochet.
Frank Trottier,	Frank Trochet.
Antoine Trottier.	Antoine Trochet.
Ermine Trottier.	Ermine Trochet.
John Trottier.	John Trochet.
Alex Trottier.	Alex Trochet.
Andrue Trottier.	Andre Trochet.
William Trottier.	William Trochet.
J. B. Moture.	Baptist Mötür.

**NAMES OF VOTERS AS SHOWN
BY CERTIFICATES OF REG-
ISTRATION SURRENDERED
TO THE JUDGES.**

W. H. Murray.
L. K. Devlin.
Isadore Trottier.
Samuel Pepin.
J. B. La Framboise.

W. H. Murray.
L. K. Devlin.
Isadore Truchot.
Simon Pepin.
John B. Lafrombois.

In the comparison of these names the board of canvassers must recognize some presumptions of law and fact, to wit, that the judges and clerks of the Box Elder Precinct performed their sworn duty, and permitted no persons to vote at this election who were not legal voters; and that, under the laws of this State, the names of such voters must be found upon the check lists of the precinct, or the surrendered certificates. It is established by the check lists that there were thereon the names of forty-six voters; that five of this number failed to vote; that five electors voted upon county registry certificates; and that the voting list contains the names of forty-six voters. The spelling of the names of the voters by the clerks in the poll-books is unimportant if the officers of the precinct are satisfied concerning their identity. The statute provides: "When the judges of election shall have good reason to believe, or when they shall be informed by a qualified elector, that the person offering to vote is not the person who was so registered in that name, the vote of such person shall not be received until he shall have proved his identity as the person who was registered in that name." (Stats. 16th Sess. p. 132, § 14.) Under our mode of conducting elections the misspelling of names by the clerks must frequently take place. A forcible example of this assertion is afforded by a glance at the names of the foregoing voters who produced the county certificates. What should have been the legitimate conclusion of the canvassing board from these documents? There is only one name upon the check list resembling, respectively, Henry F. Schwartz, Henry Brough, or J. B. Moture. The surnames of the family written Trochet, or Trottier, or Trottier, with their Christian names, and initial

letters of John B., William, Frank, Antoine, Andre, John, Alex, and Ermine, which are given in the poll-book and check lists, can be identified. The small number of names (forty-six) upon the check list is a circumstance to be remembered in trying to reach a satisfactory determination. There is no foundation for the deduction pleaded in the answer, that there were upon the list of voters the names of sixteen, or even one, person, who had no right to vote at Box Elder Precinct. It is therefore ordered that the peremptory writ of mandamus be issued.

HARWOOD, J. (*concurring*).—The determination of this proceeding by an order for the issuance of a peremptory writ of mandate was concurred in by all the members of this court, but upon a question of practice raised, and as to what constitutes "election returns" under the provisions of the statute, there appears to be some difference of views. At the commencement of the proceeding, on the affidavit of the relator, an order was made by the chief justice of this court, at chambers, in vacation, for the issuance of the alternative writ of mandate, returnable to the court, for hearing and determination by the court at a time designated. The question of practice comes by way of motion to quash the proceeding, on the ground that the court has no jurisdiction thereof for hearing, because the preliminary order for the alternative writ was issued by one justice instead of being issued by the court, convened and sitting as such. The writ of *mandamus*, as defined by the statute of this state, is a mandate by a court of competent jurisdiction "to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person." (Comp. Stats. Mont. § 566, Code Civ. Proc.) The statute provides that the proceeding for mandamus shall be commenced "upon affidavit, on the application of the party beneficially interested," and prescribes two methods of bringing on the hearing of the application before the court. One method prescribed is by the applicant giving at least ten days' notice to the party about to be complained of that application for the writ will be made to the court at the time and place stated in

the notice. (Code Civ. Proc. § 569.) This brings on the final hearing of the application by the court, and, if a writ is granted on such hearing, the same is made final and peremptory. The other method prescribed by statute for bringing on the hearing of the application is the issuance of an alternative writ on the affidavit and application of the party beneficially interested. This preliminary process is addressed to the party complained of, and states "generally the allegations against him," and requires of him the performance of the duty which appears from the affidavit to have been wrongfully neglected; or that he "show cause before the court at a specified time and place, why he had not done so." (Code Civ. Proc. § 568.) The effect of this process is merely formal and initiatory, for the statute, after prescribing these two methods of calling upon the alleged delinquent party to appear before the court upon the hearing, provides that: "The writ shall not be granted by default. The case shall be heard by the court, whether the adverse party appear or not." (Code Civ. Proc. § 569.) By this statute it seems plain that, in view of the legislature, the alternative writ, while called a writ, was not regarded as anything more than the initiatory process, in case that method of bringing on the hearing was used; for that writ is issued before even a notice is given to the adverse party, and if, in view of the law, that was regarded in the sense of an effective writ, there would be a peculiar contradiction in the statute, because, as we have just seen, the statute provides that "the writ shall not be granted by default. The case shall be heard by the court, whether the adverse party appear or not." It is significant, too, that the proceeding which comes on for hearing after service of the alternative writ or notice is called in the statute a "case," and provision is made for the effective writ of command after a hearing of the case by the court, and not otherwise. These provisions of the statute, directing the practice in this proceeding, places the alternative writ, as to its effect, on the same basis as the notice served by the applicant on the adverse party. The office of each process is to bring the proceeding on for hearing. The adverse party may, if he is in fact neglecting to perform such duty, "which the law specially enjoins," voluntarily perform the same, on receiving either the notice or the alternative writ,

and answer that he has performed such duty; or he may neither perform the act sought to be compelled, nor answer the alternative writ or notice, nor otherwise appear to show cause for the alleged neglect. He may wait, with the assurance of the statute that on the return of these formal proceedings a hearing must be had by the court, and no final and effective command will be granted without such hearing. Whether the proceeding was instituted by notice given by the applicant before making the application, or by way of the alternative writ sent out as a process of the court, the proceeding is to be heard and determined by the court, after the adverse party has been given the opportunity to answer, and no peremptory command can issue without such hearing and final determination by the court. The question raised is whether it is proper practice, in the initiation of these proceedings, under these provisions of law, to allow the alternative writ to be issued as the court's process, on the order of one justice, as has been the practice, or whether the court must hear the application before the adverse party is notified, and before the real hearing of the proceeding, in order to send out the preliminary process to bring on the hearing.

It is made plain from the provision of the statute that the alternative writ amounts to no more, in effect, than to cite the party complained of to appear and show cause, if any he has, why he should not be compelled by mandate to perform the duty in question. Therefore, to hold that the court may not, in its practice, under the provisions of this law, allow the preliminary process to issue upon the order of one justice, is holding the power of the court very narrow in the realm of mere formal practice. If the court may not, through the order of one of its justices, allow the preliminary process to be issued to bring on the hearing, the power of the court in this regard is limited by such construction below that of a private suitor in the proceeding. The applicant may bring on the hearing by notice, on his own motion, without any order or process of the court, and that notice accomplishes the same purpose as the alternative writ. Respondent's counsel have cited no authority to support the point they contend for. It is urged on hypercritical and extremely narrow construction of terms. The Constitution provides that this court "shall have power, in its

discretion, to issue, hear, and determine" the writ of mandamus, among other writs specified. This is exactly what the court has done in this proceeding; and no one affirms, nor is it held, that the peremptory writ of mandamus can be issued without hearing and a final order by the court. It does not follow therefrom that the court shall not, through the order of one of its justices, allow the preliminary process to go forth, which effects nothing more than to bring on the hearing. The fact that the Constitution provides that the District "Courts and the judges thereof shall have power also to issue, hear, and determine writs of mandamus," etc. (art. viii, § 11), does not, in my opinion, tend to establish the proposition that this court must not allow the preliminary process to go out through the order of one justice to bring on the hearing; nor does the provision of the Constitution that one justice of this court may "issue, hear, and determine" writs of habeas corpus and of *certiorari* in certain cases, have a tendency, in my opinion, to restrict the power of this court in the orderly and convenient shaping of its practice so as to avoid waste of time by superfluous formality in the issuance of the preliminary process to bring on a hearing before the court, in matters where the court must give full hearing before any effectual order can be made. The tendency of those liberal provisions for the use of said writs by one justice of this court and by a lower court, or judge thereof, in the administration of justice, seems to me to point in the other direction. (*State ex rel. Macklin v. Rombauer*, 104 Mo. 619.) For these reasons I concur in overruling the motion to quash the alternative writ issued in this proceeding. In view of the fact that the practice pursued in this proceeding has been so long established, and followed by able judges, administering the law under the same statute now prevailing, and that such practice, as to the issuance of the preliminary process, does not affect any substantial rights of the parties, I should not regard the point raised as worthy of extended treatment, had it not become the occasion for dissension in the course of this proceeding.

The most important point which arose in this proceeding, in my opinion, was the question as to what documents the county canvassing board may examine as constituting the election returns from the several precincts. An important part of such

returns is one of the two poll-books kept by the clerks of election, wherein they enter the name of each elector as he appears, and his vote is admitted by the judges; and also showing the result of the canvass of the votes of such precinct by the judges and clerks thereof at the close of the election; which poll-book, duly certified and attested, as required by law, is returned to the county canvassing board. That part of the returns is provided for by sections 1019-1030, inclusive, of the Compiled Statutes. Subsequent to the passage of that statute an act was adopted by the legislative assembly providing for the registration of all qualified electors, prior to the time of holding each general election; and providing that votes can be received from electors only on a showing of their previous registration, as required in said act. (Sess. Laws, 1889, p. 124.) This law provides that the fact of previous registration must be shown by a "check list" for each voting precinct, which is a list of the registered voters of such precinct, taken from the official register of the district; or, if the name of the elector whose vote is offered, does not appear on such "check list," his vote can only be received on his production and surrender of a certificate of registration, issued by a registry agent, under seal of his office. Two classes of such certificates of registration are provided for in the Registration Act. One class comprise certificates issued to qualified electors, who, on account of a vacancy in the office of the registry agent of the district wherein they reside, are authorized to qualify before the registry agent of another registration district of the county, and receive from the latter agent a certificate of registration; and upon the production and surrender of such certificate the vote of the elector holding the same is admitted in his own precinct. This class of certificates is provided for in section 3 of the Registration Act, which reads as follows: "It shall be the duty of the chairman of the board of county commissioners of any county in Montana, when he shall have received notice from any responsible citizen of the death, disqualification, or resignation of any registry agent, after the opening and prior to the closing of the books of registration, to immediately, without giving notice, appoint some competent person to fill such vacancy, and it shall be the duty of such person so appointed to qualify within two

days after receiving notice of such appointment. Should such person so appointed fail to qualify within the time herein provided, voters may, upon producing evidence as to their right to vote, be registered in any other district in said county, and any person so registered in any other district shall, upon presentation and surrender of a certificate of registration, signed by the registry agent of said district, be considered a legal voter in the precinct of the district in which he is a resident: *provided*, this section shall not be so construed as to interfere with the right of the full board of commissioners to make such appointment, except in cases herein provided. If any person applies to be registered in any district other than the one in which he resides, and is entitled, upon proof, to a certificate of registration, as provided for in this section, such applicant, in addition to the proof required by this act to entitle him to registration, shall take and subscribe to an oath before the registry agent in substantially the following form:—

“_____, Montana, _____, 18—.

“I do solemnly swear that I make this application for registration in District No. ____ of ____, county of ____, Montana, because there is no registry agent within election district No. ____, which is the district where I reside and am entitled to vote.

“Subscribed and sworn to before me this _____ day of _____, 18_____, Registry Agent.”

Whereupon such person shall receive from the registry agent of such district a certificate, which said certificate shall bear the registry seal, and be substantially as follows, to wit:—

“Registration Certificate: I hereby certify that _____ is a citizen of the United States, or has declared his intention to become such, of the age of _____ years, and has been a resident of Montana for the past _____ consecutive months, and a resident of _____, _____ County, for _____ months, and of the precinct for more than _____ days, and that he is in all respects a qualified registered elector under the laws; and I further certify that the reason he applies for and that I grant this registration certificate is because within election district No. ____, where he resides, there is no registry agent; and I

further certify that he is, under the laws, entitled to vote in the _____ precinct of election district No. ____, _____ County, Montana.

"Witness my hand and seal of office in election district No. ____, _____ County, Montana.

[SEAL.] "_____, Registry Clerk.

"Election District No. ____, _____ County, Montana."

The other class of certificates is called in the Registration Act, "State Registry Certificates," and comprise those issued to an elector after such elector has been registered in the district where he resides, and his name is erased from the register upon his request, and a State certificate of registration is granted to him by the registry agent. Upon presentation and surrender of such certificate the elector holding the same may be registered in another place, where he has established his residence in time to become a qualified voter at the next ensuing election. On being so registered in the latter district, such elector surrenders his registration certificate, and his name goes into the check list of the precinct where he is last registered. But it is further provided in section 11 of the Registration Act that "in case any registered and qualified elector who has had delivered to him a State registration certificate pursuant to this section, and who has for good cause been unable to register the second time anywhere within Montana before the date of the closing of the registration books, may offer to vote at any precinct within the county where he resides and was registered to vote, or in any precinct in the county, but not the precinct where he lives and was registered, the judges of election shall challenge such person peremptorily, and put to him under oath such questions making him prove his identity as the person to whom such certificate is issued, and such other questions as may seem to them proper in order to fully test such person's qualifications; and if he be disqualified for any cause, or fail or refuse to answer any question concerning his qualifications, or if he fail to identify himself, he shall not be permitted to vote; but if he be qualified he shall surrender his certificate, and the judges shall enter his name on the lists, and he shall be entitled to vote." By these provisions it appears that votes may be received of electors whose names are not on the check list of the precinct, but

such votes must be received on certificates of registration, issued as provided in the act, and surrendered to the judges of election.

Now, in relation to the returns of election (in addition to one of the poll-books of the precinct, to be returned to the county canvassing board, as provided by the general election law), the Registration Act provides as follows: "The copy of the official register, together with the 'check lists' for election precincts, as herein provided, shall be carefully preserved and duly certified to by the registry agent, and delivered, together with affidavits of objection, to some one of the judges of election in each election precinct, at a time not later than the day next preceding that on which such election is to be held, and such 'check lists' shall be carefully preserved, and any surrendered certificates which may have come into the hands of such registry agents pursuant to this act, and after election they shall be transmitted by the judges of election to the clerk of the board of county commissioners in connection with and as a part of the 'election returns,' as provided by law." (§ 10, Registration Act.) It seems plain from the provision that the legislature, in requiring the registration of all qualified electors, and that no votes should be received except upon evidence of previous registration, shown by the check lists, or certificates of registration surrendered to the judges, and in further expressly providing that the check lists and certificates of registration which come into the hands of the judges from the registry agent "shall be transmitted by the judges of election to the clerk of the board of county commissioners, in connection with, and as part of, the election returns, as provided by law," intended to place before the canvassing board, in the returns, the documentary evidence showing the registration of the electors appearing from the poll-book to have been allowed to vote at such precinct. This provision was evidently made to carry out the spirit and purpose of the Registration Act. The return of the evidence of registration with the poll-book, as part of the returns, would show at once that the vote appearing from the poll-book to have been received and returned was a registered vote, and would thus constitute in some measure a voucher for the regularity of the returns shown by the poll-

book. But the legislature, while expressly requiring the check lists and certificates of registration which came into the hands of the judges from the registry agent to be returned as "part of the election returns," omitted, in the details, to require such other certificates of registration on which votes were received by the judges of election to be returned also with the check list. Here is a slight lapse or omission in the matter of details. But is not the intention of the legislature plainly visible? Why provide that the check lists (which would undoubtedly include the names of the great majority of electors lawfully voting at the precinct), and also such certificates of registration as the judges received from the registry agent, should be returned to the canvassing board "as part of the election returns?" If this manifests an intention that the returns should be accompanied by the evidence of registration whereby the judges admitted the votes appearing from the poll-book to have been cast, then that intention should be given effect in construing and applying the law; and that construction would simply be that, because of this manifest intention, the canvassing board should be allowed, not only to look at the check lists, but also to look at certificates of registration surrendered to the judges, on which votes were admitted, for the check list is not the entire evidence of registration on which votes may be lawfully received. This construction allows the provision of the Registration Act, as to such returns, to have effect. Any other construction makes vanity of the provision for sending up the check lists and certificates of registration received by the judges of election from the registry agent, and makes that provision operate to mystify, obscure, and cast doubt or suspicion on the returns shown by the poll-book, because part of the names on the poll-book may not appear from the check list to have been registered, and would be unaccounted for as registered, unless shown to be registered by an examination of the certificates of registration upon which they were admitted. A construction in conformity with the manifest intention of the legislature would construe the provision to mean simply that the county canvassing board may look at, "as part of the election returns," the evidence of the registration of the electors whose votes were received, as appears from the poll-book, and such evidence

would in a great measure vouch for the genuineness, honesty, and regularity of the vote returned, as having been received in conformity with the registration law. The statute of this State provides that in construing a statute "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc. § 630.) Another rule laid down by our statute is that, "in the construction of a statute, the intention of the legislature, and, in the construction of the instrument, the intention of the parties, is to be pursued if possible." (Code Civ. Proc. § 631.)

It being clear that the legislature, by providing that check lists and certificates of registration mentioned should constitute "part of the election returns," intended that the evidence of registration on which the votes were received as returned by the poll-book should be subject to examination by the canvassing board, as part of the returns, the majority of this court held that such manifest intention should have effect. This was an important point in the case. The canvassing board alleged in its answer as cause for rejecting the returns from said precinct, in effect, that the names of sixteen persons appeared upon the poll-book as having been allowed to vote at said precinct, who did not appear to have been registered; and that "it appeared from said returns that said sixteen persons were not entitled to vote at all at said election." If this was true, more than one third of the forty-six votes returned by the poll-book from said precinct were fraudulent, and did not represent votes cast by registered electors, as appeared from examination of the registration lists.

On demurrer to the answer it was contended that the canvassing board had no right to look at all the evidence of registration on which votes were received, as part of the returns, to see whether the list of electors recorded in the poll-book as having voted were registered. The demurrer was overruled by a concurrence of a majority of the court, and the respondents were thus allowed to substantiate by proof the allegation of their answer as to the great discrepancy between the registration lists and the vote returned by the poll-book. But on the hearing the canvassing board utterly failed to establish such allegation. On bringing in the check lists and certificates of registration

surrendered to the judges of election, it was found that these documents showed the registration of a greater number of electors than was returned in the poll-book as having voted at said election. There was no such thing as the registration list falling short of the voting list by sixteen names, as alleged, or by any number whatever. The only support offered for that allegation was the pointing out of some difference in the spelling of names as written by the registry agent and by the clerks of election, or a difference occurring by way of using initial letters for the Christian name in one case and writing it at length in the other, or the dropping of an initial, as "Henry Brough," in the registration list, and "Henry S. Brough" as recorded by the clerks of election in the poll-book. However slight was such difference, it was seized upon as ground for alleging that the elector as to whom it occurred was not registered. This was a strong allegation to make and verify by oath on such a pretext. It carried with it the direct implication that the officers of such election precinct had committed a crime by receiving votes from persons not registered, to the extent of more than one third of all the votes received, if intentionally done; and this in a neighborhood where only forty-six votes were cast, and very likely every voter was personally known to some of the election officers. But it was disclosed on the hearing, by the evidence of Mr. Rodgers, clerk of the board of county commissioners, and of the canvassing board, that in the rejection of the returns from said precinct neither the check list nor the certificates of registration were examined or sought to be examined by the canvassing board, nor were the returns rejected on the grounds of any discrepancy in the spelling of the names as appeared in the registration list and on the poll-book, nor was any such ground considered in the rejection of said returns. The returns were rejected on the untenable grounds set forth in certain affidavits presented to the canvassing board, which the canvassing board had no jurisdiction to inquire into or determine. These features of the case are sufficiently treated in the main opinion prepared by the chief justice. The purpose of this concurring opinion was to more fully treat the question of practice as to the issuance of the alternative writ of mandamus on the order of one justice of this

court, and the question as to what constitutes election returns under the provisions of the statute.

DE WITT, J. (*dissenting from the order denying the motion to quash the writ, on the ground that it was not issued by the court; that point being passed as decided, of opinion that the demurrer to the answer should be sustained, and peremptory writ thereupon issued*).—I am of opinion that one justice in vacation had no authority to order the writ issued. The majority of the court held that the writ was properly issued. That point being decided, and being now the law of this court, I come to the demurrer to the answer, and the accompanying motion for the peremptory writ forthwith. That demurrer and that motion, I think, should have been sustained. The result of these views is, of course, that I am of opinion that the peremptory writ should have issued without going further in the hearing than overruling the demurrer to the answer. I will state the reasons for my conclusions upon these two points:—

On the third day of December, 1892, the October term of this court adjourned without day. On the sixth day of December, 1892, the December term opened. On the fifth day of December, 1892, the alternative writ in this matter was issued. It is therefore a fact that the writ was issued in vacation. How it came to be issued appears by the following indorsement on the application:—

“Upon reading the foregoing affidavit and application of Eugene E. Leech, it is ordered that the clerk of the Supreme Court issue a writ in the alternative, in accordance with the prayer of the said Leech, returnable before the Supreme Court upon Friday, the ninth day of December, A. D. 1892, at ten o'clock A. M.

HENRY N. BLAKE,

“Chief Justice of the State of Montana.

“Dated December 5, 1892.”

Upon the return day, December 9th, the respondents, the canvassing board, moved to quash the writ for the reason that it was issued without authority. The provision of the Constitution in reference to the issuance of the writ of mandamus (§ 3, art. viii.) is, in full, as follows: “The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in

equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power, in its discretion, to issue and to hear and determine writs of habeas corpus, mandamus, *quo warranto*, *certiorari*, prohibition, and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. When a jury is required in the Supreme Court to determine an issue of fact, said court shall have power to summon such jury in such manner as may be provided by law. Each of the justices of the Supreme Court shall have power to issue writs of habeas corpus to any part of the State, upon petition by, or on behalf of, any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any District Court of the State, or any judge thereof; and such writs may be heard and determined by the justice or court or judge before whom they are made returnable. Each of the justices of the Supreme Court may also issue and hear and determine writs of *certiorari* in proceedings for contempt in the District Court, and such other writs as may be authorized by law to issue." It seems to me clear that this writ was not issued by the court, for the court, according to section 5, article viii. of the Constitution, "shall consist of three justices, a majority of whom shall be necessary to form a quorum;" and this writ was not ordered issued by three justices, or a quorum, but by one justice. (See *Hobart v. Hobart*, 45 Iowa, 501; *Lewis v. Hoboken*, 42 N. J. L. 377.) As I understand the matter as before us on the motion to quash, it is simply whether the Constitution gives to one justice, in vacation, the authority to order this writ issued. It is my opinion that the words of section 3 do not give this authority to one justice. That view is fortified by reading section 11 of the same article, in which the Constitution gives to the District Courts, and the judges thereof, power to issue, hear, and determine writs of mandamus, etc. In the District Courts the judges are expressly given this power. In the Supreme Court a justice is not given this power. The distinction in the two courts, it appears to me, is of some significance. Section 3 of article viii. says expressly that the court shall have power to issue, hear, and determine writs of habeas corpus, mandamus,

and the other writs named. There is the power of the court clearly defined. Then, in the same section, comes a special grant of power to the justices; that is, that each of the justices shall have power to issue, hear, and determine two of the writs, which are named in the general list above, that is, the writ of habeas corpus, and the writ of *certiorari* in proceedings for contempt in the District Court. It would seem that a writ of habeas corpus and a writ of *certiorari* in contempt in the District Court were of some special urgency, and I think it apparent that they are urgent writs. The writ of habeas corpus does, and the writ of *certiorari* in contempt may, involve the immediate personal liberty of the citizen. Therefore I can see a reason why the facility for the issuance, hearing, and determining of these writs should be extended, and why this power is given to a justice, in addition to the power given to the court.

These two writs—that is, habeas corpus, and *certiorari* in contempt—are singled out from the general list of writs mentioned in section 3, article viii., and the power is given to a justice to issue, hear, and determine them. Why so distinguish them from other writs, among which is mandamus, unless the distinction means something? The Constitution says that the court may issue, hear and determine all the writs. The Constitution says that a justice may issue, hear, and determine the writs of habeas corpus and *certiorari* in contempt. I think it is conceded that a justice may not hear and determine a writ of mandamus. But the words "issue, hear and determine" are used together in section 3, article viii. The same construction that holds that a justice may not hear and determine, would hold that he may not issue, the writ. It may be suggested that this is an alternative writ, and that, while one justice may not issue a peremptory writ, he may issue the alternative. But the alternative writ is a writ of mandamus. In the Constitution neither the word "peremptory" nor "alternative" is mentioned. All that we find mentioned is the "writ of mandamus," and that writ may be issued by the court only. I do not, therefore, understand where the authority is found in the Constitution for one justice to issue an alternative writ any more than a peremptory writ. Nor does the statute help it. (Code Civ. Proc. tit. 13, ch. 2.) The peremptory and alternative writs are there

described; but no distinction is there made as to the authority to issue either. The statute (§ 568) says that "the writ shall be either alternative or peremptory;" that is, the alternative is a writ. The writ may be issued by the court only. (Const. art. viii. § 3.) Perhaps the alternative writ accomplishes nothing more than the notice provided for in section 569, chapter 2, title 13 of the Code of Civil Procedure. If the alternative writ is nothing more than a notice, why go to a justice for it? Why not go to the clerk? But the clerk may not issue it. (*People v. Brooks*, 57 Ill. 142.) The peremptory writ shall not be granted by default, but the case must be heard. (§ 569.) So I see no cause for importing into the Constitution a construction that a justice may issue the writ, for the hearing and determination must be by the court; and nothing, from this point of view, is accomplished by an alternative writ that would not be by a notice. I see no necessity or policy in giving the Constitution such construction, even if the words of that instrument gave any authority for that construction. But, after all, it is as clear to my mind that the court only may issue the writ as it is that the court only may hear and determine it finally. Such are my views as to the power of one justice to issue the writ. I think the writ should have been quashed.

But, it being decided otherwise by the majority of the court, and also having gotten beyond the matters raised upon the demurrer to the writ, I hold the following opinion as to the demurrer to the answer of respondents:—

The respondents filed an answer, which is their showing of cause why they, as the canvassing board of Choteau County, should not be required to count the vote of Box Elder Precinct. The answer sets up that votes were bought at that precinct, that some of the voters were aliens, and other matter which is not necessary to recite in detail, to the effect that, if true, many of the votes at that precinct were illegal. Matter of this nature, if true, would, of course, be competent and pertinent in an election contest (which this proceeding is not), a contest prosecuted in a court to determine the title to an office other than that of legislator, or a contest prosecuted before a house of the legislature to determine the right of a member to a seat in such house. But, as is held in *Pigott v. Board of*

Canvassers of Cascade Co. 12 Mont. 537, and by every other court that ever uttered a syllable upon the subject-matter of this sort, frauds, irregularities, illegal votes, and corrupt practices, back of the apparent result upon the face of the returns, cannot be inquired into by a canvassing board, and constitutes no showing of cause why the board should not be required to count and declare the apparent result of the vote. The only matter in the answer, which, to my mind, is worthy of notice, is the following allegation: "That it appeared from an inspection of the registration list, and of the list of persons returned as voting at said Box Elder Precinct No. 18, that sixteen names of persons, to wit, Henry F. Schwartz [giving the names of fifteen others], appeared upon the list of persons returned as voting at said Box Elder Precinct, which said sixteen names did not appear to have ever been registered as voters at said precinct; and no surrendered certificates of registration were transmitted by the judges of election to the clerk of the board of county commissioners in connection with, or as a part of, the election returns of said precinct, or in any manner whatever; and it appeared from said returns that said sixteen persons were not entitled to vote at all at said election." Respondents contend that by this allegation it appears that sixteen persons voted at Box Elder Precinct who were not entitled to vote, and that this appeared upon the face of the returns, and therefore could be noticed by the canvassing board. Whether, if all this be true, it authorized the board to apply the remedy of casting out the whole vote of the precinct, it is not now necessary to decide. But did it appear upon the face of the returns that these sixteen persons were not entitled to vote? I will examine respondent's allegations from the point of view, of course, on the demurrer, that they are all true. Concede it to be true, then, as alleged, that these sixteen persons did not appear to have been registered as voters at that precinct; also that no surrendered certificates were transmitted by the judges of election to the board of canvassers, does it even then appear by the returns that these sixteen persons were not entitled to vote? That they were not entitled to vote is what must appear by the returns, in order to authorize the board to take cognizance of the fact, if it be a fact. What had the board before it as returns?

The registration list, for one thing. Consider it to be the fact that these sixteen persons did not appear thereon; so far, then, it appeared that they had no right to vote. What else had the board? "The surrendered certificates which may have come into the hands of the registry agent." (§ 10, Registration Law.) Consider it to be the fact that these sixteen persons did not here appear; so far, then, it appears that they had no right to vote. But had they the right to vote in any other manner if they were not on the registration list of the precinct, and were not among the names on "surrendered certificates which had come into the hands of the registry agent?" Section 11 of the Registration Law answers this inquiry. I will not cite that section in full. (See p. 131, Laws 16th Sess.) It provides that a registered voter may have his name taken off the official register, and have issued to him a State registration certificate. Upon this State certificate he may be registered in another election district. If he does not so re-register, then upon certain conditions and showing, as set out in section 11, to the judges of election, on election day, he may vote upon his State certificate, without re-registration. This State certificate upon which he votes is to be surrendered. (§ 11.) It is not provided that this surrendered certificate shall be forwarded to the canvassing board, or be a part of the election returns. (§§ 10, 11.) Therefore, the sixteen persons named in respondent's answer could have voted on State certificates, under the provisions of section 11. If they voted on State certificates, the following facts must be noticed: Their names would not appear upon the registration list of the district in which Box Elder Precinct was, or upon the registration list of any other district in Choteau County, or elsewhere, because the names must have been stricken off in order to obtain the State certificate. Again, their names would not appear upon "surrendered certificates which may have come into the hands of the registry agents" (§ 10), because they had not re-registered. (§ 11.) So, by an examination of either the registration list or the surrendered certificates required to be returned to the canvassing board, would it appear to the canvassing board that such persons were not entitled to vote; whereas the fact is, they would be entitled to vote upon their State certificates, surrendered on election day (and not to the registry agent, as provided

in section 10), which State certificates it is not provided shall be sent to the canvassing board, or be part of the returns. Therefore, it did not appear by those papers that are made part of the returns that these sixteen persons were not entitled to vote, and, for all that appears on the returns, they were as fully entitled to vote as any person on the registration list. Therefore, as it did not appear upon the returns that these sixteen persons were not entitled to vote, it was not a matter, even if true, that the canvassing board could, or now can, inquire into. Therefore, the matter set up by the canvassing board, which I have quoted and discussed, was not a showing of cause why the board should not count the vote of Box Elder Precinct. Consequently, the demurrer to the answer should have been sustained. The answer, then, being out of the way, the peremptory writ should have issued. I think that the registration law should provide that State certificates, voted on and surrendered at the time of voting, should be sent in to the convassing boards as part of the returns. The omission so to provide was a grave error, and one to be corrected by the legislature; if it sees fit. I do not find that it is now so provided in the law. In fact the law clearly does not so provide. The only method by which I can see that the law could be construed as so providing is to hold that it ought to so provide; and because it ought to, it does. I concede that it ought to. But I am not yet prepared to hold that what I think a legislature ought to do I shall say it has done. Holding the views that I venture to entertain as to the demurrer to the answer, I see no occasion to express any opinion as to the proceedings in the case subsequent to the overruling of that demurrer.

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40 479**DUNN, APPELLANT, v. CITY OF GREAT FALLS,
RESPONDENT.**

[Submitted January 11, 1893. Decided January 23, 1893.]

CONSTITUTIONAL LAW—Municipal corporations—Bonds—Validity under Act of March 5, 1891.—The Act of March 5, 1891 (2d Sess. Laws, p. 245), authorizing certain incorporated cities to incur indebtedness for specific purposes by the issuance of bonds to an extent not exceeding four per cent of their assessed valuation, instead of three per cent as limited by the state constitution (§ 6, art. xiii.), is not void as being wholly in conflict with said section of the Constitution, but is void only to the extent of such repugnancy; and therefore bonds issued by a city under such act are valid where the amount of indebtedness so incurred is less than three per cent of the assessed valuation of such city.

SAME—Act void in part.—Where a part of a statute is unconstitutional that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other.

SAME—Construction of constitutional provisions.—Constitutional provisions as well as statutes are construed by the same canons of construction. (*State v. Kenney*, 11 Mont. 558, cited.)

Appeal from Eighth Judicial District, County of Cascade.

Action to enjoin sale and delivery of city bonds. Tried on agreed case before BENTON, J. Defendant had judgment below. Affirmed.

W. G. Downing, for Appellant.

J. B. Leslie, for Respondent.

PEMBERTON, C. J.—This is an appeal from the judgment of the lower court, rendered on a submission on an agreed statement of facts, under and in pursuance of chapter 3, section 468, division 1 of the Compiled Statutes of Montana. On the second Monday of April, 1892, as appears from the agreed statement of facts, an election was regularly held, in accordance with the statutes of the state, in the city of Great Falls, by the qualified voters of said city, to determine whether or not the city council of said city should issue, and have authority to issue and sell, the bonds of said city, to wit: forty thousand dollars of said bonds for the purpose of purchasing lands for a park, to be owned and used by said city; thirty thousand dollars of said bonds for the purpose of funding the outstanding indebtedness of said city; thirty thousand dollars of said bonds to be used for constructing

a main sewer in and for said city—the total of said bonds to aggregate the sum of one hundred thousand dollars. At said election the bonds, and all of them, were voted by a considerable majority of the voters of said city. Under the authority of said election all of said bonds were issued and sold by said city, but have not been delivered to the purchasers. This proceeding was instituted by the appellants, who were plaintiffs below, to have said bonds declared invalid, and the sale and delivery thereof perpetually enjoined, on the ground that the law under which they were issued is unconstitutional, and the bonds consequently void. The court below held that the city council had the legal and constitutional authority to issue, sell, and deliver said bonds, from which judgment this appeal is taken.

It is conceded that the election held in said city on the proposition to authorize the issuing of all of said bonds, the issuing and sale thereof, and all proceedings had and things done in relation to said bonds, were had, held, and done under and in pursuance of an act to enable cities and towns to incur indebtedness, passed by the legislative assembly of the state of Montana, approved March 5, 1891, and acts of which it is amendatory. Section 1 of the Act of 1891, *supra*, is as follows:

"Section 1 of 'An act to amend an act to enable cities and towns to incur indebtedness,' approved February 28, 1889, is hereby amended so as to read as follows:

"Sec. 1. That any incorporated city or town in the state of Montana having an assessed valuation of eight hundred thousand dollars or over is hereby authorized to submit to the qualified electors of such city or town the question whether coupon bonds shall be issued on the credit of such city or town to an amount not exceeding, including existing indebtedness, four per cent of its assessed valuation, for the purpose of funding any or all existing indebtedness, constructing waterworks, public buildings, street grades, bridges, sewers, or other public improvements."

In the enactment of this law the legislative assembly seemingly overlooked section 6, article xiii, of the state constitution, which is as follows:

"No city, town, township, or school district shall be allowed to become indebted in any manner, or for any purpose, to an

amount, including existing indebtedness, in the aggregate exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness; and all bonds and obligations in excess of such amount given by, or on behalf of, such city, town, township, or school district, shall be void."

Counsel for appellant claim that as the statute under which these bonds were issued permits cities of the class therein named to incur an indebtedness of four per cent of its assessed valuation, including existing indebtedness, whereas the constitution, as above quoted, limits the amount of indebtedness such cities may incur to three per cent of its assessed valuation, it necessarily follows that the whole of said statute is void by reason of its being in conflict with said section of the constitution. Counsel for respondent contend that there is much of value and importance in said statute that can be enforced, and ought to be enforced, by the city council, in order to properly improve the city, and enforce and execute the power granted to the city council; and that the statute is only unconstitutional in so far as it provides for incurring an indebtedness of four per cent whereas the constitutional limitation of the indebtedness is three per cent. The respondent contends that the only repugnancy in the statute to the constitution is the rate of indebtedness the city can incur; that the city, by issuing and disposing of these bonds, will not incur an indebtedness greater than allowed by the constitution; that the city, under said statute with the four per cent stricken out, could incur this indebtedness without violating or exceeding the constitutional limit of three per cent, leaving said statute intact as to the manner of proceeding in the exercise of authority by the city council in the care and necessary improvement of the city. It is conceded that the assessed valuation of the property included within the city limits of the city of Great Falls exceeds seven million dollars; that, at the time of the election referred to herein, the indebtedness of said city was about thirty thousand dollars; and that the indebtedness of said city, including the bonds in this controversy, will not exceed one hundred and fifty thousand dollars, which is considerably below the constitutional limit.

The question before this court for adjudication is this: Is the statute of the state of Montana, approved March 5, 1891, under which the bonds in controversy were issued, wholly in conflict with section 6, article xiii, of the constitution, and void, or only void to the extent of said apparent repugnancy?

Sutherland, in his work on Statutory Construction (§ 138), speaking of implied repeals, says: "Subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. The intention to repeal, however, will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance. Implied repeals are not favored."

Judge Cooley, in his work on Constitutional Limitations, speaking of statutes unconstitutional in part, says: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So, the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable, object, by means repugnant to the constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments

void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." (5th ed., p. 211.) And also, as to the duty of the court to uphold a statute when the conflict is not absolute, the same author says: "The duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first seem most obvious and natural; for, as a conflict between the statute and constitution is not to be implied, it would seem to follow, where the meaning of the constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect. This is only saying, in another form of words, that the court must construe the statute in accordance with the legislative intent: since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity." (5th ed., p. 220. And see *Newland v. Marsh*, 19 Ill. 376; *Dow v. Norris*, 4 N. H. 16; 17 Am. Dec. 400.)

In *People v. Supervisors*, 17 N. Y. 235, 241, Harris, J., delivering the opinion of the Court of Appeals, says: "A legis-

lative act is not to be declared void upon a mere conflict between the legislative and the judicial power. Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption." Commenting on this decision, Judge Cooley says: "And this, after all, is only the application of the familiar rule that in the exposition of a statute it is the duty of the court to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound so to construe the statute, if practicable, as to give it force and validity, rather than to avoid it or render it nugatory." (5th ed., pp. 221, 222.) In *Fabbri v. Murphy*, 95 U. S. 196, Mr. Justice Clifford, speaking for the court, says: "Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant, is not favored in any case." In *Wood v. United States*, 16 Peters, 342, it is held "that there must be a positive repugnancy between the provisions of the new law and the old, to work a repeal by implication, and even then the old law is only repealed to the extent of such repugnance." The same doctrine is asserted in *Henderson's Tobacco*, 11 Wall. 652; also in *Evans v. Job*, 8 Nev. 322; *State v. Swift*, 11 Nev. 128; *Attorney-General v. Amos*, 60 Mich. 372. In the rules and law relating to repeal the same canons of construction apply equally to constitution and statutes. (*State v. Macon County Court*, 41 Mo. 558; *State v. Kenney*, 11 Mont. 553.) In *People v. Potter*, 47 N. Y. 375, Folger, J., says: "The established canons of construction applicable to statutes, to wit: that the intent of the lawmaker is to be sought for, and, when discovered, is to prevail over the literal meaning of the words of any part of the law, and that this intent is to be discovered, not alone by considering the words of any part, but by ascertaining the general purposes of the whole, and by considering the evil which existed calling for the new enactment, and the remedy which was sought to be applied, apply as well to the construction of a constitution as to that of a statute law. A constitution is also to be held as prepared and adopted in reference to existing statutory laws, upon the provisions of which, in detail, it must depend to be set in practical operation."

From a consideration of the authorities cited we are of opinion that the statute of the state of Montana, approved March 5, 1891, is only repugnant to and in conflict with section 6, article xiii, of the constitution of the state in so far as it fixes the amount of indebtedness the city of Great Falls might incur at four per cent of the assessed valuation of the property included within the city limits, instead of three per cent as limited by said section of the constitution; that said section of the statute is not wholly in conflict with said section of the constitution, but only to the extent of the repugnancy above stated; that the city council of the city of Great Falls did not exceed its legal or constitutional authority or power by creating the debt in the manner set forth in the agreed statement of facts herein, or in the issue and sale of the bonds complained of by appellant, such debt being within the constitutional limit of three per cent. Jurisdiction of this case is entertained for the sole purpose of construing the question of the conflict between the statute mentioned herein and the constitution of the state, and not with any purpose of passing judicially upon the real or agreed facts of the controversy.

Judgment of the lower court is affirmed.

Affirmed.

HARWOOD, J., and DE WITT, J., concur.

KLEINSCHMIDT, RESPONDENT, v. KLEINSCHMIDT,
APPELLANT.

[Submitted July 25, 1892. Decided January 30, 1893.]

Pleading and Proof—Variance—Debt evidenced by note.—A promissory note is not itself the payment of a debt, but is the written evidence of the debt, and therefore, in an action to recover money due on a non-negotiable instrument, where the answer averred facts showing an indebtedness from plaintiff's assignor to defendant for money loaned, the fact that such indebtedness was proved to be evidenced by a note does not create a variance between the pleadings and proof.

Appeal from First Judicial District, Lewis and Clarke County.

Action on contract. The cause was tried before HUNT, J. Plaintiff had judgment below. Reversed.

Statement of facts prepared by the judge delivering the opinion.

In December, 1886, the defendant, Albert Kleinschmidt, and one Henry Klein were interested in a contract for the construction of the Helena, Boulder Valley and Butte Railroad. Each of said persons owned one sixth of that contract. On December 3, 1886, said Kleinschmidt and Klein sold to J. W. Buskett the one-eighth interest of the net profits to be realized by them from said railroad contract. For that one-eighth interest Buskett delivered to them 10,000 shares of stock in the Boulder Mining and Reduction Company. This transaction was evidenced by a writing, of which the following is a copy:

"HELENA, M. T., December 3, 1886.

"For and in consideration of (10,000) ten thousand shares of the Boulder Mining and Reduction Company stock, delivered to us by J. W. Buskett, we agree to pay over to him all of the ($\frac{1}{8}$) one-eighth net profits realized by us out of a contract in which we are interested, in building thirty miles of the Helena, Boulder Valley and Butte Railroad. Said net profits shall be paid by us to J. W. Buskett immediately after we receive our share, which is ($\frac{1}{6}$) one-sixth each. J. W. Buskett shall not advance any funds whatsoever to prosecute the construction of the railroad named.

[SIGNED] "ALBERT KLEINSCHMIDT.
 "HENRY KLEIN."

The stock was delivered by Buskett to Kleinschmidt and Klein, and the writing above set forth was signed and delivered by Kleinschmidt and Klein to said Buskett. On April 22, 1887, said Buskett, for a valuable consideration, transferred and delivered to the plaintiff, T. H. Kleinschmidt, his right, title, and interest in the said contract, and the profits therein mentioned. On October 22, 1888, these profits mentioned were ascertained and paid to Albert Kleinschmidt and Henry Klein; and said Henry Klein paid to T. H. Kleinschmidt, as his share, the sum of \$2,997.98. The plaintiff sues Albert Kleinschmidt for an equal amount, to wit, \$2,997.98, which Albert Kleinschmidt has not paid to plaintiff.

The substantial contention in the case was as follows: The
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defendant's answer alleges "that after the making of such memorandum [that is to say, the agreement transferring the one-eighth interest from Albert Kleinschmidt to Buskett], on or about the fifth day of January, 1887," a certain other transaction took place. That transaction, as defendant alleges it in his answer, was that Buskett requested the loan of \$1,350 from defendant, Albert Kleinschmidt, to purchase more stock in the above-mentioned Boulder Mining and Reduction Company; that Albert Kleinschmidt advanced said money to Buskett, and Buskett agreed with Kleinschmidt that Kleinschmidt should retain out of Buskett's share of the net profits from the railroad contract enough of said net profits to pay Kleinschmidt the advance of \$1,350, with interest at 12 per cent per annum; and that Buskett hypothecated said stock so purchased to Albert Kleinschmidt, as additional security for the payment of said \$1,350. The answer further states that Buskett's share of said profits in the railroad contract was \$2,947.76, which A. Kleinschmidt retained and still retains, for the purpose of paying the obligation of \$1,350, with interest, as aforesaid, which is still due and unpaid. The plaintiff filed a replication in which he states that the \$1,350 indebtedness was not an open account, but was upon a promissory note, which was not due or payable until after April 22, 1887. The answer sets up said matter of \$1,350 as a debt from Buskett to Kleinschmidt. It does not describe that debt as being evidenced by note. Upon the trial of the case it was developed, in evidence, that on January 5, 1887, Buskett gave to Kleinschmidt his note for \$1,350, with interest at one per cent a month, for the \$1,350 received from Kleinschmidt to purchase the said shares of stock described. The plaintiff moved to strike out all of the testimony relating to the debt of Buskett to Albert Kleinschmidt, for the reason that it appeared that there was a written instrument explaining and giving the terms and conditions of the loan—that is, a promissory note—which cannot be explained, varied or diminished by oral testimony, and that this indebtedness appears to have been in the form of a note, and not a bare loan or open account of indebtedness, as alleged in the answer as new matter, and therefore is a variance between the pleadings and the proof. The court then makes the following ruling: "That motion is sustained, on the ground

that there is a material variance between the pleadings and the proof." Following this ruling, defendant's counsel asked a series of questions in reference to the note, and the alleged indebtedness from Buskett to Kleinschmidt, all of which questions were excluded by the court. In this connection the court refused to allow defendant to prove whether the indebtedness of Buskett to Albert Kleinschmidt had been paid. The court, by its action, excluded from the case, and from the consideration of the jury, all evidence in reference to the indebtedness of \$1,350 by Buskett to Kleinschmidt. Defendant's defense or counterclaim being out of the way, verdict and judgment were for plaintiff for the full amount claimed. A motion for new trial was made by the defendant, which was denied, and from this order and the judgment he appeals.

Cullen, Sanders & Shelton, and Henry C. Smith, for Appellant.

If the debtor gives his own note for a debt, it will not be an absolute payment unless it is taken as such by agreement of the parties. (*Knox v. Gerhauser*, 3 Mont. 267; 3 Randolph on Commercial Paper, § 1509 et seq.) If the new promise is executory and not binding, it is no satisfaction until it be executed. If it be a binding promise for a new consideration payable at a future date certain, then the original right of action is suspended until that day comes, and if the promise is not then duly performed this right revives and the promisee has the election to sue on the original cause of action or on the new promise. (2 Parsons on Contracts, § 196; *Brewster v. Bourne*, 8 Cal. 506; *Puckford v. Maxwell*, 6 T. R. 52; *Cumming v. Hackley*, 8 Johns. 202; *Putnam v. Lewis*, 8 Johns. 389; *Johnson v. Weed*, 9 Johns. 310; *Porter v. Talcott*, 1 Cowen, 359; *Raymond v. Merchant*, 3 Cowen, 147; *Hughes v. Wheeler*, 8 Cowen, 77; *Olcott v. Rathbone*, 5 Wend. 490; *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529.) When the note of the debtor is taken and not paid at maturity, the creditor ought to bring suit upon the original consideration. (3 Randolph on Commercial Paper, § 1581; *Porter v. Talcott*, 1 Cowen, 359; *Clark v. Young*, 1 Cranch, 181; *Clifton v. Litchfield*, 106 Mass. 34; 3 Randolph on Commercial Paper, § 1674 et seq.; *Byles on Bills*, 230; 2 Parsons on Contracts, 436.)

Toole & Wallace, for Respondent.

DE WITT, J.—On December 3, 1886, Albert Kleinschmidt transferred absolutely to John W. Buskett one-eighth of his (Kleinschmidt's) interest in the profits arising from the construction of the Helena, Boulder Valley and Butte Railroad. This was for a consideration delivered by Buskett, and received by Kleinschmidt. The transaction was evidenced by a writing signed by Kleinschmidt, and delivered to Buskett. Defendant proved that the loan of \$1,350 was on January 5, 1887, and that for this loan Buskett gave him a promissory note, at ninety days, which had been renewed by Buskett, and negotiated by Kleinschmidt, in 1887. The court refused to allow defendant to prove whether the debt had been paid. Now, in this condition of affairs, on April 22, 1887, T. H. Kleinschmidt, plaintiff, buys from Buskett, for a valuable consideration, his one-eighth interest. Afterwards, and on October 22, 1888, the money for Buskett's one-eighth interest in the contract comes into the hands of Albert Kleinschmidt, along with Kleinschmidt's own profits, which he had not transferred. Now T. H. Kleinschmidt is in court demanding from Albert Kleinschmidt that he (Albert Kleinschmidt) deliver to him that which he (T. H. Kleinschmidt) bought from Buskett. Albert Kleinschmidt declines to deliver these profits to T. H. Kleinschmidt, and says that he holds them as security for the payment of said \$1,350, and interest at twelve per cent per annum since January 5, 1887. The position of Albert Kleinschmidt seems to be that he claims that these alleged facts are an absolute defense to the action of plaintiff. But whether a defense or a counterclaim or a setoff, it does not here seem necessary to determine, as will appear below.

The writing of December 3, 1886, by which Albert Kleinschmidt and Henry Klein transferred the one-eighth interest in the profits to John W. Buskett, was not a negotiable instrument. Therefore, when Buskett transferred his interest so obtained in these profits to T. H. Kleinschmidt the latter took the same subject to the provisions of section 5 of the Code of Civil Procedure, which is as follows: "In the case of an assignment of a thing in action, the action by the assignee shall be

without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration before due." Therefore, under this statute, if Buskett was indebted to Albert Kleinschmidt when he, Buskett, transferred the one-eighth profits to T. H. Kleinschmidt, then Albert Kleinschmidt could plead against T. H. Kleinschmidt said debt, as a defense or setoff, as the case might be, in an action by T. H. Kleinschmidt on the assigned Buskett claim. Therefore, the \$1,350 debt of Buskett to Albert Kleinschmidt was proper matter in the answer, and was good, against T. H. Kleinschmidt, unless Albert Kleinschmidt had estopped himself from setting it up. Such estoppel was pleaded—whether well or not, need not be said—in the replication, but that point was not reached in the case, as will appear below. The court struck out the evidence as to this \$1,350 debt. This was on the ground of a variance between the allegations of the answer and the proof. The answer stated that Buskett requested the loan of \$1,350, and Albert Kleinschmidt advanced that amount to him. The proof showed that Buskett had given Albert Kleinschmidt a note for the amount. It did not appear that the note had been paid. It appeared that the note had been renewed, but it did not appear that the debt evidenced by the note had been paid, and the court declined to hear evidence as to whether it had. A promissory note is not itself the payment of a debt. It is the written evidence of the debt. If the answer pleads the fact of an indebtedness, and it appears in proof that the indebtedness is evidenced by a note, the fact is then in proof that the debt exists. It is that fact that was alleged. A debt was alleged. A debt was proved. We do not understand that there was a variance. Therefore the court erred in eliminating the testimony of Buskett's indebtedness to Albert Kleinschmidt, on the ground upon which the motion was made, viz., a variance. Such is the point before us on the appeal, and the views just expressed are decisive.

Respondent urges some other points upon which he contends that his judgment should be sustained, notwithstanding the error above discussed. But those matters which he presents

for our consideration were not reached in the case, nor were they before the lower court. For example, he contends that defendant was estopped to set up the Buskett debt. But such matter was for a replication by plea, and for rebuttal in proof. But defendant's matter in the answer as to the Buskett debt being swept out of the case, the trial never reached the point of rebuttal. Nothing was offered to rebut that which in the defense had been put out of the case by the ruling of the court upon the question of variance. On which ruling, as above observed, the judgment and order denying the new trial must be reversed.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

13	70
13	365
22 ²	163
34 ⁴	188
13	70
14	125
32 ²	163
35 ⁴	959
13	70
16	86
17	453
13	70
24	64
24	65

HOSKINS, APPELLANT, v. WHITE ET AL., RESPONDENTS.

[Argued, June 24, 1892. Decided January 30, 1893.]

PARTIES—*Attachment bond*.—In an action upon an attachment bond, which was signed only by the sureties, the plaintiffs in the attachment suit are parties having an interest in the controversy adverse to the plaintiff, and therefore may be properly joined with the sureties as parties defendant. (*McIntosh v. Hurst*, 6 Mont. 287; *Pierse v. Miles*, 5 Mont. 549, cited.)

INFANCY OF PLAINTIFF—*Appointment of guardian*—*Amendment*.—Where it is disclosed by proof upon the trial of a cause that the plaintiff is a minor and the complaint is then amended to show the minority and emancipation of plaintiff, it is error for the court to sustain a demurrer to the complaint on the ground of want of legal capacity to sue, but the court, upon the suggestion of plaintiff's minority, should clothe him with capacity to sue by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian.

SAME—*Emancipation of infant*.—The emancipation of a minor by his parents does not clothe him with capacity to sue in his own name without the appointment of a guardian.

Appeal from Sixth Judicial District, Park County.

Action for wrongful attachment. Judgment was rendered for defendants below by HENRY, J. Reversed.

E. P. Cadwell, for Appellant.

White and Platt were proper parties defendant (Code Civ. Proc. § 182; Hawe's Parties to Actions, § 97; 2 Mont. 429; *McIntosh v. Hurst*, 6 Mont. 287; *Pierse v. Niles*, 5 Mont. 549),

although the form of plaintiff's action should have been by a guardian or his next friend, he did not so sue the defendants, neither was he so sued by the defendants, White and Platt, hence they must be deemed to have joined issue on his complaint and thus waived the form of the action. (*Waite's Actions and Defenses*, p. 75; *Boobier v. Boobier*, 39 Me. 406; *Davies v. Turton*, 13 Wis. 185; *Drago v. Moso*, 1 Spear, 212; 40 Am. Dec. 592; *Moke v. Fellman*, 17 Tex. 367; 67 Am. Dec. 656; *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630; *Taunton v. Plymouth*, 15 Mass. 203; *Vent v. Osgood*, 19 Pick. 572; *Sweet v. Tuttle*, 14 N. Y. 465; *Fellows v. Niver*, 18 Wend. 563; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Palmer v. Davis*, 28 N. Y. 242; *Morrell v. Morgan*, 65 Cal. 575; *Wedel v. Herman*, 59 Cal. 507; *Mills v. Bland*, 76 Ill. 381; 1 Chitty on Pleading, p. 436.) The defendants White and Platt must be barred from now insisting on that which has at all times been waived, from being so inconsistent with their former position as to insist on that which, if insisted on before, would have invalidated their own procedure. (Bigelow on Estoppel, 567, 568, 601, 604; *Bates v. Ball*, 72 Ill. 108; Herman on Estoppel, §§ 816-20, 449.)

Word, Smith, & Word, for Respondents.

HARWOOD, J.—Plaintiff brought this action to recover damages for the alleged wrongful attachment of his goods in a former suit prosecuted against him by respondents, F. A. White and J. L. Platt, Jr. To obtain the attachment in the former suit, White and Platt procured and filed the undertaking required by statute, executed by D. O'Shea and William O'Connor, as sureties, but such undertaking was not signed by the attaching creditors, White and Platt. In that suit it appears Hoskins prevailed, and the attachment on his goods was dissolved. Now he prosecutes this action against White and Platt, and their sureties, O'Shea and O'Connor, all joined as defendants herein, to recover damages for said wrongful attachment.

The first question presented on this appeal is whether the district court erred in sustaining the demurrer interposed by defendants White and Platt, on the ground that they were

improperly joined with O'Shea and O'Connor as defendants in this action. The tendency of the Montana decisions appears to be to the effect that the sureties in such an undertaking, and the principal on whose behalf it was executed, may be proceeded against in the same action for the damage sustained. (*McIntosh v. Hurst*, 6 Mont. 287; *Pierse v. Miles*, 5 Mont. 549. See, also, *Jennings v. Jonier*, 1 Cold. 645.) It ought to be so held on principle. The subject of the action is the damage committed by the wrongful attachment. The principal and sureties are all liable for one and the same thing, to the amount for which the undertaking provides. (*Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154.) If A, in writing, guarantees that B will pay his own grocery bill, would it be contended that A and B could not be sued together in the same action for that debt? Although B did not sign the guaranty to pay his own debt, both are liable for the bill—one as primary debtor, and the other as surety or guarantor. Here, in the action at bar, White and Platt and O'Shea and O'Connor are all liable for one and the same damage, committed by the wrongful attachment—White and Platt primarily, and O'Shea and O'Connor as sureties. The latter have guaranteed, as evidenced by the written undertaking, that White and Platt will pay such damages.

In *Pinney v. Hershfield*, 1 Mont. 367 (an action to recover damages for wrongful attachment), it was held that "a demand on the principal debtor, and a failure on his part to do that which he is bound to do, are requisite to found any claim against the guarantor. (2 Parsons on Contracts, 29.)" In the case at bar the condition of the undertaking is that the undersigned sureties, "in consideration of the premises and of the issuing of said attachment, do jointly and severally undertake, in the sum of twelve hundred and seventy dollars, and promise, to the effect that if the defendant recover judgment in said action, or if the attachment be dismissed, the plaintiff will pay all costs that may be awarded to the said defendant, and all damages he may sustain by reason of the attachment." Section 16 of the Code of Civil Procedure provides that "any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff." Is not the principal who caused the attachment, and whom the sureties guaranteed would

pay the damage, a party in interest, adverse to the plaintiff? He is bound to reimburse the sureties for whatever they are compelled to pay on his behalf in the premises. The statute provides that where "one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtor or debtors, the court may order the judgment so to state; and, upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements, of the principal debtor or debtors, or, if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety." (Comp. Stats., div. 5, § 1293.)

Respondents' counsel contend that there can be no implied parties to the obligation sued on. True enough, but the obligation sued on should not be confounded with the evidence by which defendants became parties to that obligation. The obligation, resting upon all these defendants alike, is to compensate for the damage resulting from said wrongful attachment. That damage is the cause of action. The obligation to answer therefor rests upon several parties. White and Platt are primarily bound therefor, because of the obligation imposed by law to answer for a damage directly caused by their unlawful act in suing out the attachment. They are the principal parties, charged therewith by operation of law, because they are the direct authors of the damaging act. But the law, to make sure provision that the damage wrought by the misuse of its process will be compensated, requires that others shall take upon themselves the same obligation, namely, to answer for the damage caused by the wrongful procurement and use of the attachment writ. O'Shea and O'Connor, by their written engagement, took upon themselves the same obligation, and upon this evidence the law lays upon them a judgment for said damage, of course not exceeding the amount of their undertaking; and, if judgment was sought against the sureties for any greater amount than their undertaking, it would be limited thereto. It is eminently proper that all parties bound for this damage

should be proceeded against in the same action (*Jennings v. Jonier*, 1 Cold. 645), if they can be found and served with summons, because plaintiff has a right to judgment against them without prosecuting two actions, although plaintiff, at his option, may proceed against all or part of those liable to answer for the same obligation (Code Civ. Proc., § 20; Comp. Stats., div. 5, § 1296); and to deny plaintiff's right to have such judgment as he may recover entered against White and Platt, as well as O'Shea and O'Connor, in this action, by sustaining the demurrer on behalf of White and Platt, on the alleged ground of misjoinder, was error.

The second proposition to be considered arose in this wise: After demurrer on behalf of White and Platt was sustained, the action was proceeded with against said sureties O'Shea and O'Connor. It appears that upon the trial the evidence disclosed the fact that the plaintiff was a minor, then of the age of nineteen years. Thereupon evidence was also introduced to show "that plaintiff was emancipated, and given his time, by his father and mother, in the month of March, 1889, and was released by them from any responsibility to them as their son, by reason of his being under the age of twenty-one years;" that during all times stated in the complaint, "and at the present time, plaintiff was acting and doing business as a man of the age of twenty-one years; that neither of his parents have or claim any right, title, or interest in his property or his earnings, as his parents, since, or at any time since, the month of March, 1889." At the close of the introduction of evidence on behalf of plaintiff, he asked leave of court to amend his complaint "to conform to the evidence introduced;" and, having obtained such leave, filed his complaint as amended, setting forth the facts above stated in relation to his minority and alleged emancipation by his parents. Defendants O'Shea and O'Connor thereupon interposed a demurrer to said last amended complaint, on the ground "that it appears upon the face of said amended complaint that plaintiff has no legal capacity to sue or maintain this action." This demurrer was sustained by the court, and that order is assigned as error. The principles involved herein were elaborately discussed by De Wolfe, J., and the same conclusions reached in *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154.

Where an amendment is properly allowed to cover some variance, and make the allegations conform to the proof, as contemplated in sections 112 and 113 of the Code of Civil Procedure, we do not think it would be subject to demurrer. The amendment as to the minority and the emancipation of plaintiff, however, had no reference to matter originally introduced in the case by any allegations, so there was no variance "between the allegations in the pleadings and the proofs" to be cured by such an amendment. But the feature disclosed by the proof on which the amendment was introduced related to plaintiff's capacity to prosecute his action alone. The only question in relation to that point is whether the court ruled correctly in entertaining and sustaining a demurrer on the disclosure by the proof that plaintiff was a minor, in court with an action, without a guardian, and the insertion of that fact in the complaint by amendment. Where nonsuit has been granted on such disclosure, it has been held error on appeal, and that it is only ground for abatement. (*Drago v. Moso*, 1 Spear, 212; 40 Am. Dec. 592; *Moke v. Fellman*, 17 Tex. 367; 67 Am. Dec. 656; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 552; 1 Chitty on Pleading, 464.) It is also directly held that an amendment is allowable by the insertion of the name of the guardian or *prochein ami*. (*Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 552.)

The terms of our statute seem to contemplate that a minor may come into court with his action; and, it appearing that he is a minor, the court will, on suggestion of that fact, clothe him with capacity to prosecute his action by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian (Code Civ. Proc. §§ 9, 10, 116), and from the authorities *supra* this would appear to be the proper practice in such a case as this. The language of sections 9 and 10 of our Code of Civil Procedure is as follows: "When an infant is a party he shall appear by guardian, who may be appointed by the court in which the action was prosecuted, or by a judge thereof, or a probate judge." (Sec. 9.) "The guardian shall be appointed as follows: 1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or, if under that age, upon the application of a relative or friend of the infant. 2. When the infant is de-

fendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon application of any other party to the action, or of a relative or friend to the infant." (Sec. 10.) Section 116 of the Code of Civil Procedure provides for amendment by inserting the name of a party. (*Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 552.)

While the question of emancipation would be a relevant inquiry if the controversy related to the right of plaintiff to property or earnings, as between himself and parents or others, we do not think emancipation by the parent would clothe the minor with capacity to sue, especially in view of our statute in that regard. In *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630, the court (per Kellogg, J.) said: "The emancipation of the infant by his father did not enlarge or affect his capacity to make a contract, and its only effect was to release him from his father's control, and to give him a right, as against his father, to his earnings. (*Taunton v. Plymouth*, 15 Mass. 203; *Vent v. Osgood*, 19 Pick. 572.)" The judgment must be reversed, and the cause remanded, with direction to overrule demurrers, and allow plaintiff to proceed according to the views herein set forth; and it will be so ordered.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

13	76
15	813
32	283
39	286
13	76
17	188
13	76
18	448
13	76
36	65
13	76
133	10
13	70
40	470

GOODRICH LUMBER COMPANY v. DAVIE ET AL., RESPONDENTS.

[Argued, July 11, 1892. Decided February 6, 1893.]

MECHANIC'S LIEN—Notice—Sufficiency of description.—A notice of lien which describes the property as lot 14 in a certain block and city plat can not sustain a lien for materials used in the erection of a building on lot 18, as such description, being neither uncertain, defective, or ambiguous, can not be aided or explained by oral evidence and is therefore not within section 1871 of the fifth division of the Compiled Statutes, providing that any error or mistake in the description shall not affect the validity of the lien, provided the property may be identified by such description.

BANK—Description.—The description of the buildings upon the lands sought to be charged with a lien as "that a certain frame building and outhouses" is insufficient to identify the property, as such description would apply to many others.

premises in a large city upon which such buildings stood, particularly where the lessor does not depend upon such description but gives a "more particular description" by lot, block, and official plat.

SAME—Judgment.—Where the action is upon an account and to foreclose a lien for materials furnished by the plaintiff, the owner, contractor, and a mortgagee being made defendants, it is error for the court upon sustaining demurrers of the owner and mortgagee to the complaint, to render judgment that the plaintiff take nothing by its complaint, as a cause of action was stated against the contractor on the account for materials, and such judgment will be modified accordingly.

Appeal from Eighth Judicial District, Cascade County.

Action on an account and to foreclose mechanic's lien. Judgment on demurrer was rendered for the defendants below by BENTON, J. Modified.

Statement of facts prepared by the judge delivering the opinion.

By this action it is sought to obtain a judgment for an account, and to foreclose a lien for lumber and material for a building, supplied by the plaintiff. The defendant Gelsthorpe is the owner. The defendant Davie is the contractor with the owner for the construction of the building, and the person to whom the material was sold. The defendant Welch is a mortgagee under an instrument dated March 21, 1891. The material was furnished between January 8 and May 9, and the lien was filed May 12, 1891. The property against which it is sought to enforce the lien, and that which is actually owned by the defendant Gelsthorpe, is described in the complaint as follows: "Lot thirteen (13) in block two hundred (200) of the city of Great Falls, Cascade county, Montana, as designated on the official plat of the First Addition to the town of Great Falls, aforesaid, as the same is filed in the office of the recorder of Cascade county, Montana." The notice of lien is attached to the complaint as an exhibit. It first mentions the premises as "that certain frame building and outhouses erected upon that certain lot, piece, or parcel of land, hereinafter particularly described." The particular description of the lot found thereafter in the notice is as follows: "That certain lot, piece, or parcel of land hereinbefore mentioned, and to which this lien applies and attaches, is situate, lying, and being in the city of Great Falls, county of Cascade, and state of Montana, particu-

larly described as follows, to wit: Lot numbered fourteen (14) in block number (200) of the city of Great Falls, Cascade county, Montana, as the same is described on the official plat of the townsite of Great Falls, aforesaid, a certified copy of which is on file in the office of the recorder of Cascade county, Montana." The description in the notice of the lien is of lot 14, block 200. The complaint asks foreclosure against lot 13, block 200. To cover the point that the description in the notice of lien was for one lot, and foreclosure is sought against another lot, the complaint has the following paragraph: "Plaintiff further alleges that the description contained in said lien was at the time the only description known to the plaintiff of the premises upon which said building was erected, and that said description was by error and inadvertence placed therein; that block 200 was at said time the only block of that number within the city limits of the said city of Great Falls, and the lot designated within said block, within the description contained in said lien, is adjoining and contiguous to the lot upon which said dwelling-house of the said W. H. Gelsthorpe is erected, and is separated therefrom only by an imaginary line; that the said lot fourteen (14) described in said lien has no buildings whatsoever thereon, as plaintiff is informed and believes; that said lot thirteen (13) is now, and was at all the times hereinbefore mentioned, the only lot in said block two hundred (200) of the city of Great Falls, aforesaid, owned by said W. H. Gelsthorpe, defendant herein, and that said fact is, and was generally known at the time." A motion was made to strike out these allegations. This motion was sustained, then a demurrer to the complaint was sustained, and judgment entered for defendants. The plaintiff appeals. The appearance on this motion and demurrer was by Gelsthorpe, owner, and Welch, mortgagee, only. Davie, the contractor and debtor, did not join in the proceeding. The point of the appeal is whether the description, as made in the notice of lien, is such that "the property may be identified by said description." (Sec. 1371, div. 5, Comp. Stats.)

Thomas E. Brady, for Appellant.

The description of the premises sought to be charged with this lien is not contained in the last part of the notice of lien,

which gives the lot and block, and the entire notice must be considered in order to ascertain whether or not the premises are sufficiently described. In the body of the notice the premises are described as a frame building and outhouses erected on the lot hereinafter described, and owned by defendant Gelsthorpe, and which was being constructed for him by defendant Davie as contractor. That would be a sufficient description of itself, without any mention of the lot by number provided the number of the block was correctly given in the notice of lien: and the number of the block was given correctly. (Laws Extra Sess. 1887, p. 71.) This statute, being remedial in its nature should be liberally construed (*Black v. Appolonio*, 1 Mont. 342.) The description of the building is a sufficient description of the lot upon which it stands. (*Brown v. La Crosse City etc. Co.*, 16 Wis. 555; *Strawn v. Cogswell*, 28 Ill. 457; *Dewitt v. Smith*, 63 Mo. 263; *McCoy v. Quick*, 30 Wis. 521; *Brown v. Wright*, 25 Mo. App. 54.) It was for the jury and not for the court to say whether the description was sufficient for identification. (*Cleverly v. Moseley*, 148 Mass. 280.) A lien statement which gives the wrong number of the section is not fatally defective. (*National Lumber Co. v. Bowman*, 77 Iowa, 706.) If enough appears in the description of the property upon which a mechanic's lien is claimed to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty, to the exclusion of others, the description is sufficient. (*Scholes v. Hughes*, 77 Tex. 482; *Northwestern Cement etc. Co. v. Norwegian etc. Seminary*, 43 Minn. 449; *Brown v. Wright*, 25 Mo. App. 54. See, also, *McNamee v. Rauck*, 128 Ind. 59; *White v. Stanton*, 111 Ind. 540; *Newcomer v. Hutchings*, 96 Ind. 119; Phillipps' Mechanics' Liens sec. 379; *Merrigan v. English*, 9 Mont. 113.)

Cooper & Pigott, for Respondents.

Gelsthorpe was the owner in fee of lot thirteen on which the buildings stood. Therefore the lien must attach, if at all, to both houses and lot. (Gen. Laws, 1887; § 1375; Extra Sess., § 3 Act of Sept. 14th.) There can be no lien upon the building separate from the land in the absence of a positive statute providing for it. (*Kellogg v. Littell etc. Manuf. Co.*,

1 Wash. St. 407, and cases there cited; *Kezartee v. Marks*, 15 Or. 529.) The description contained in the notice locates the houses on lot fourteen to the exclusion of every other parcel of ground. It is required by the statute, that the property to be charge with the lien shall be identified by the description. The lot is the property to be charged with the lien. The houses thereon are part of the lot, and the lien is a charge upon them only because it is a charge upon the realty. That the houses and lot 13 on which they stand are situated in block 200 is no aid to the description. "Lot of land" in a city means a fractional subdivision of a block, generally limited by fixed boundaries on a recorded plan or plat. The lien claim should be made against that lot only upon which the building is, although the adjoining lots belong to the same owner and have no buildings upon them. (2 Jones on Liens, § 1370, and authorities there cited.) No case cited by plaintiff is authority to support its contention that the description under consideration identifies lot 13 as subject to the lien. The question presented by the record is whether lot 13 is identified by the description in the notice. A claim of lien cannot be reformed. (*Lindley v. Cross*, 31 Ind. 106; 99 Am. Dec. 610; *Goss v. Strelitz*, 54 Cal. 640.) The same certainty of description is requisite as in case of a levy under execution, so that the court may be informed what land to order to be sold, and the purchaser may be able to locate it. (2 Jones on Liens, § 1422.) In the case at bar, the location of the land is clearly ascertained by a sufficient description in the claim admitting of but one construction. Therefore the description cannot be controlled by evidence of intention tending to establish a different location. We can conceive of no reason why any part of the description should be rejected, but if "lot 14" be rejected, the description is insufficient for then the structures are located somewhere in block 200. Our statute gives a lien to the extent of one lot, whereas the claim of lien, conceding to it the construction most favorable to plaintiff describes a whole block. This affords no identification of the one lot to which the lien is limited. (*Kellogg v. Littell etc. Manuf. Co.*, 1 Wash. St. 407; *Bedsole v. Peters*, 79 Ala. 133; *Turner v. Robbins*, 78 Ala. 592; 2 Jones on Liens, §§ 1422, 1425, and cases cited; *Williams v.*

Porter, 51 Mo. 441; *Ranson v. Sheehan*, 78 Mo. 668; *Willamette Mill etc. Co. v. Kremer*, Cal., Oct. 22, 1890; 24 Pac. Rep. 1026; *Montrose v. Connor*, 8 Cal. 344; *Vane v. Newcombe*, 132 U. S. 220.)

DE WITT, J.—A recent case in Indiana (1890) says: “The principle drawn from the authorities seems to be this. That a description in a notice of lien cannot be supplied by oral evidence, but that an ambiguity may be explained, and the premises identified.” (*McNamee v. Rauck*, 128 Ind. 59.) The description in the notice of lien in the case at bar is not defective, or insufficient, or uncertain. It does not come within the class of cases where descriptions of such a nature have been allowed to be helped by averment. The description of the ground is perfectly definite and certain. The only difficulty is that it was a wholly wrong description. The Indiana case remarks that a description in a notice cannot be supplied by oral evidence. That is what is sought to be done in the case at bar—to substitute in the complaint a lot wholly different from the one particularly described in the notice of lien. Again, it is said in the Indiana case: “But the ambiguity may be explained, and the premises identified.” There is no ambiguity here, either latent or patent. The notice of lien clearly and particularly describes lot 14. It is alleged in the complaint that lot 13 was the only one in block 200 upon which the defendant Gelsthorpe had any buildings, and plaintiff contends that the buildings were a sufficient identification of the land; and cases are cited where a description of the building was held to sufficiently identify the land. For instance, “the brick city hall to be erected by the city of Hillsboro.” (*Scholes v. Hughes*, 77 Tex. 482.) Again, “a mill belonging to the party of the second part, at Marseilles,” when the party had but one mill. (*Strawn v. Cogswell*, 28 Ill. 457.) And other cases where the building was some public or well-known structure, and where the description relied upon was the building alone, and there was no attempt to describe the land, either by metes and bounds, or by lot and block. But in the case at bar the description of the building is, “that certain frame buildings and outhouses.” That description would apply to hundreds

of premises in a large city. It is not like a city hall (*Scholes v. Hughes*, 77 Tex. 482) or the works of the La Crosse City Gas Light and Coke Company (*Brown v. Coke Co.* 16 Wis. 555). The lienor herein does not depend upon the building and out-houses for description, but gives force, in his notice, to what he calls a "more particular description" of the premises: that is, by lot and block, on an official plat filed in a public office. It is said in *Northwestern Cement etc. Co. v. Norwegian etc. Seminary*, 43 Minn. 452: "In this state the important means of identifying real estate is, in the case of urban property, the description according to the plat." The same system obtains in this state. In the cities and towns, and even small villages, the system is well nigh universal to describe land by lot and block of the plat of an official survey filed in the proper public office.

Our statute provides: "But any error or mistake in said description shall not affect the validity of said lien, provided the property may be identified by said description. (Comp. Stats., div. 6, § 1371.) In the description under consideration there is no error or mistake. "Lot 14 in block 200" is certain, definite, or unmistakeable. By it one would identify that piece of ground as officially platted. By it he would not identify lot 13. A description of lot 14 cannot sustain a lien for materials furnished and used in the erection of a building on lot 13. The judgment of the court was that the plaintiff take nothing by its complaint, and that said defendants Gelsthorpe and Welch recover their costs. But a cause of action is stated in the complaint against Davie, the contractor, on an account for the materials furnished to him; therefore the judgment that the plaintiff take nothing by its complaint was not warranted, because all that the court reached was that there was not a cause of action against the owner and a mortgagee. The district court is therefore directed to modify the judgment so that it shall be to the effect that the plaintiff take nothing by its complaint as against Gelsthorpe and Welch only. The judgment as so modified is affirmed.

Modified.

PEMBERTON, C. J., and HARWOOD, J., concur.

McDONALD, RESPONDENT, v. PINCUS ET AL., APPELLANTS.

[Argued June 19, 1892. Decided February 6, 1893.]

PLEADING—Sham answer—Motion to strike out. — Section 101 of the Code of Civil Procedure providing that sham and irrelevant answers and irrelevant and redundant matter inserted in a pleading may be stricken out, contemplates that the sham pleading is such as appears manifestly and inherently sham or appears to be false by comparison with other declarations of the pleadings, which conditions should appear upon the face of the pleading alone and not by the consideration of affidavits contradicting such allegations.

SAME—Motion for judgment. — Where an answer to a complaint on a promissory note alleged a failure of the payee to perform an agreement for labor which was the consideration for the note without alleging the terms of the agreement or the conditions or effect thereof, no ground of defense is stated, and the defendants having failed to amend their answer, the plaintiff is entitled to judgment on the pleadings.

Appeal from Second Judicial District, Silver Bow County.

Action on promissory note. Judgment was rendered for the plaintiff below by McHATTON, J. Affirmed.

Statement of facts prepared by the judge delivering the opinion.

This is an action to enforce payment of a promissory note. The complaint alleges that said note was executed by appellants, I. Pincus and Joseph Weyerhorst, to one Joseph Saunders, for the sum of two hundred and fifty dollars, principal, to bear interest after maturity, payable ninety days after date, a copy of which note is set forth in the complaint; that said Joseph Saunders transferred said note, by indorsement, to plaintiff; that no part of said sum has been paid; wherefore plaintiff demands judgment for the principal, interest, and costs. The defendant answers the complaint as follows: “*First*, that the note mentioned and described in the complaint was given by defendants to Joseph Saunders, therein named, without any other consideration than is hereinafter stated; *second*, that theretofore defendant, I. Pincus, in consideration of the promise of said Joseph Saunders, gave said Joseph Saunders said note, as an accommodation, without any other consideration, and solely for the accommodation of said Saunders, and upon his promise to do and perform said labor according to the terms

of said agreement"; that "said defendant Weyerhorst joined in the making of said note solely for the accommodation of said Saunders and Pincus; that said Saunders did not perform the labor according to the terms of the agreement entered into by him with said Pincus, and that the said note was made without any consideration whatsoever on the part of defendant Weyerhorst; that plaintiff is not a *bona fide* holder of said note for a valuable consideration, but received the same with notice of the foregoing facts, and as collateral to secure the payment of an antecedent debt, and without paying any consideration therefor"; that "defendants deny each and every allegation of the complaint inconsistent with the foregoing facts." And on this answer, which is entirely quoted above, except the formal parts, defendants ask judgment for costs. This answer was stricken from the files of said case as sham, on motion, both parties appearing at the hearing thereof. It appears that on the hearing of said motion, plaintiff offered, and the court received, and considered in support thereof, the separate affidavit of plaintiff and his attorney, William E. Carroll, Esq., and also of said Joseph Saunders, the payee of said note, which affidavits affirm in effect that all the allegations of the answer are false, and specifically state the facts upon which affiants base that declaration. The record shows that defendants' counsel excepted to the ruling of the court sustaining plaintiff's motion to strike out defendants' answer. It does not appear that any attempt was made on the part of defendants to obtain leave to file an amended answer after the original was stricken out, or that defendants otherwise offered any defense thereafter. Judgment followed, on motion of plaintiff, from which defendants prosecute this appeal.

George Haldorn, for Appellants.

A verified answer could not be stricken out as sham on motion supported by affidavits at common law, neither can it under the code. (*Wayland v. Tysen*, 45 N. Y. 281; *Greenbaum v. Turrill*, 57 Cal. 285; *Farmers' Nat. Bank v. Leland*, 50 N. Y. 673; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Smith v. Countryman*, 30 N. Y. 655; *Rogers v. Vosburgh*, 87 N. Y. 228; *Brown v. Lewis*, 10 Ind. 232; *Fay v. Cobb*, 51 Cal. 313;

2 Wait's N. Y. Practice, p. 492.) The defense set up in defendant's answer could have been proved under a plea of the general issue at common law, and the plea of the general issue could not be stricken out as sham on affidavits although not verified for the reason that the plaintiff was bound to prove his case in the usual way, and the rule at common law is not changed by the code. (*Fay v. Cobb*, 51 Cal. 313; *Greenbaum v. Turrill*, 57 Cal. 285; *Wayland v. Tysen*, 45 N. Y. 281.) Where a denial may be stricken out as sham, but slight circumstances are required to prevent the granting of the motion. (*Miller v. Hughes*, 13 Abb. Pr. 93, n.; *Munn v. Barnum*, 12 How. Pr. 563; *Gortorfs v. Taaffe*, 18 Cal. 388.)

William E. Carroll, for Respondent.

A sham answer or defense is one false in fact and not pleaded in good faith, but which may be good in form. (*Gortorfs v. Taaffe*, 18 Cal. 385; *Foren v. Dealey*, 4 Or. 92.) Courts at common law exercised the authority to strike out false or sham pleas. The practice is still the same and the power of the court to strike out a sham answer is clear, whether the answer be verified or not. (*People v. McCumber*, 18 N. Y. 315; 72 Am. Dec. 515; *Butterfield v. Macomber*, 22 How. Pr. 150; *Gortorfs v. Taaffe*, 18 Cal. 386; *Wedderspoon v. Rogers*, 32 Cal. 569; *Fellows v. Mueller*, 38 N. Y. Sup. Ct. 137; *McCarty v. O'Donnell*, 7 Rob. [N. Y.] 431-37; *Roome v. Nicholson*, 8 Abb. Pr., N. S., 343.) The defense set up in defendant's answer could not have been proved under the general issue, either at common law or under the code. (1 Chitty on Pleading, 13 Am. ed. §§ 515, 743; 1 Boone on Code Pleading, § 71, p. 119.)

HARWOOD, J.—Where the answer tenders an issue by direct and specific denial of the allegations of the complaint, or by alleging substantial facts which would constitute a defense, if true, we think the practice of receiving and considering affidavits contradicting those allegations, and thereon striking the answer out as sham, should not be approved, although there can be found some authorities in support of such practice. (See Bliss on Code Pleading, § 422; Boone on Code Pleading, § 252, and authorities cited and commented on.) Such a practice seems to lead towards a dangerous and unwarranted encroachment upon

the right of trial, in the ordinary manner provided by the constitution and laws, before judgment can be pronounced. The courts sanctioning such a practice appear to have encountered that difficulty, and it has perhaps been the cause of seeming inconsistency in their decisions on that point of practice.—Our Code of Civil Procedure provides upon this subject that "sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose." (§ 101.) Our view of the contemplation of that provision is that the sham pleading, or portion thereof to be eliminated on motion, is such as appears manifestly and inherently sham by reason of its incompatibility with the law, or the nature and condition of things within the judicial knowledge, or appears to be false by comparison with other declarations of the pleading; and these conditions should appear upon a consideration of the pleading alone.

In this case, however, the answer is wanting in allegations developing a ground of defense. All that portion of the answer which is not matter of admission of averment in the complaint is mere vague allusion to some agreement for labor, alleged to have constituted the consideration for the note in question; and without alleging the terms of the agreement alluded to, or even the conditions or effect thereof, it is alleged that the payee failed to perform "said agreement," the existence of which is only intimated. This is the only matter of defense attempted to be set up, and that is not set forth so as to enable plaintiff to reply to the same, or so as to allow the agreement hinted at to be proved, and therefore it could not be available as a defense under this answer. When the defective condition of the answer was brought to the notice of the defendants by the proceedings in this action, they appear to have made no effort to cure its incompleteness, under the liberal provisions of the code allowing amendments. Plaintiff was entitled to judgment on the pleadings, and the court was warranted in granting the judgment, without considering any motion to strike the answer from the files. Therefore let the judgment stand affirmed, with costs.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

BARDWELL ET AL., APPELLANTS, v. ANDERSON ET AL.,
RESPONDENTS.

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[Argued July 11, 1892. Decided February 6, 1893.]

MECHANIC'S LIEN—Trial—Order of proof.—In the trial of an action to foreclose a mechanic's lien it is not necessary to prove the filing of the lien before evidence can be offered that the materials entered into the construction of the building.

SAME—Complaint—Sufficiency.—A complaint on foreclosure of a mechanic's lien which alleges that the defendant contractor entered into an agreement with the defendant owners whereby the former furnished materials and erected a building upon certain described land of the latter and bought of plaintiff's assignor certain materials of an agreed value, "and which were used in and entered into the construction of said brick building aforesaid", sufficiently shows that the material was furnished for the building upon which the lien was claimed.

SAME—Lien account—Sufficiency of items.—It is no objection to a lien account that the price of each item is not shown where the aggregate price is given and the account is otherwise itemized with great particularity as to the various materials furnished so that it can be readily ascertained whether such materials were used in the structure and whether the prices charged therefor were reasonable.

SAME—Same—Sufficiency of objection.—An objection to the introduction in evidence of a lien account "that the paper purporting to be a lien is in no wise a charge upon the property described in the complaint and in the lien" will be disregarded on appeal as specifying no ground.

SAME—Same—Objection on trial—When improper.—An objection that the statute does not provide a lien for a subcontractor unless that subcontractor has a contract relation with the owner of the property, made to the introduction in evidence of a lien account, tendered by copy attached to the answer, presents the question whether the evidence offered by plaintiffs is sufficient in law to sustain a judgment in their favor which is a question that should be raised by demurrer or upon the summing up of the case and not while plaintiffs were attempting to prove the allegations of their complaint by competent evidence.

SAME—Same—Same.—An objection to the introduction in evidence of a lien account, which was made a part of the complaint, that there is nothing in said lien or account therewith filed which in any manner operates as a notice to the defendants, of the materials or the value thereof which are alleged to have been furnished for said building, presents questions which should have been raised by demurrer, or not having been so raised, should not be considered until the evidence is in, and the court applies the law to the facts shown.

SAME—Inconsistencies between lien account and complaint.—There is no inconsistency between the lien account and the complaint where the lien account stated a certain amount as per agreement and another amount as the reasonable value, and the complaint alleged the price of the goods furnished as being both the agreed price and the reasonable value.

Appeal from Eighth Judicial District, Cascade County.

Action to foreclose mechanic's lien. Judgment was rendered for defendants below by BENTON, J. Reversed.

Thomas E. Brady, for Appellants.

Roberts & Baxter, of Counsel.

The objection that "the statutes of Montana, under which this lien is supposed to have been filed, do not provide a lien for a sub-contractor unless that sub-contractor has a contract relation with the owner of the property," was fully decided by this court in *Merrigan v. English*, 9 Mont. 113, and needs no further discussion. The lien account was sufficiently itemized. (*School Dist. No. 3 v. Howell*, 44 Kan. 285; *King v. Smith*, 42 Minn, 286; *Leeds v. Little*, 42 Minn. 414; *Johnson v. Stout*, 42 Minn. 514; *Wetmore v. Marsh*, 81 Iowa, 677; *Ainslie v. Kohn*, 16 Or. 363; *Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 140; 76 Am. Dec. 507; *Selden v. Meeks*, 17 Cal. 128; *Anderson v. Seamans*, 49 Ark. 475; *Ricker v. Joy*, 72 Me. 106; *Howell v. Campbell*, 12 Phila. 388; *Knowlan v. Ellis*, 12 Phila. 396; *Manly v. Downing*, 15 Neb. 637; *Pool v. Wedemeyer*, 56 Tex. 287; *Lonkey v. Wells*, 16 Nev. 271; *Davis v. Hines*, 6 Ohio St. 473; *Gilman v. Gard*, 29 Ind. 291; *Bank of Charleston v. Curtiss*, 18 Conn. 342; 46 Am. Dec. 325; *Stuart v. Broome*, 59 Tex. 466; *Young v. Lyman*, 9 Pa. St. 449.) In *Black v. Appolonio*, 1 Mont. 342, this court said that "the words a just and true account do not mean the exact account for which judgment may be entered, but an honest statement of the account by the party claiming the lien," and in that case the court laid down the principle that such a statute being remedial in its nature, should be liberally construed.

John A. Hoffman and Cooper & Pigott, for Respondents.

There is no allegation in the complaint or in the claim of lien stating that the material was furnished for the building upon which the pretended lien is claimed. The lien does not exist unless the material be furnished for the building. (Com. Stats. 1887, 5th div., § 1370); and unless the complaint plainly and explicitly avers that the material was so furnished for the building, it does not state a cause of action. (*Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54; *Bottomly v. Rector*, etc., 2 Cal. 90; *Houghton v. Blake*, 5 Cal. 240; *Fathman etc. Mill Co., v. Ritter*, 33 Mo. App. 404.) The statute requires the material-man, who

claims a lien, to file a "just and true account of the amount due or owing to him." The language of the statute must be strictly pursued. The words "a just and true account" of necessity, contemplate an itemized statement (2 Jones on Liens, §§ 1416, 1417, and cases there cited), and it must necessarily follow that a just and true account of the amount due must be an itemized statement of the amounts due for each and every one of the different items or articles contained in any account. Unless the amount claimed for each distinct item is stated the claim of lien will be totally invalid. (*Noll v. Swineford*, 6 Pa. St. 187; *Lauman's Appeal*, 8 Pa. St. 473; Phillipps on Mechanics' liens, § 350. See also, *Busfield v. Wheeler*, 14 Allen, 139.) And such is the rule, in the case of sub-contractors who are given a direct lien. (*Russell v. Bell*, 44 Pa. St. 47; *Lee v. Burke*, 66 Pa. St. 346; Phillipps on Mechanics' Liens, § 349. See also, *Rude v. Mitchell*, 97 Mo. 365; Phillipps on Mechanics' Liens, §§ 337, 349, 357; *McWilliams v. Allan*, 45 Mo. 573.)

HARWOOD, J.—This is an action for judgment on an account, and to foreclose a lien for building materials alleged to have been purchased by defendant Anderson from plaintiffs' assignor, one F. M. Morgan, and used in the construction of a three-story brick block by said defendant Anderson, as contractor and builder, for defendants Collins and Lepley, on a lot in Great Falls, Cascade county, Montana, owned by the two last-named defendants, which building is known as the "Collins & Lepley Block."

The complaint in setting forth the allegations constituting plaintiffs' cause of action, tenders as an exhibit, attached to and made a part of the complaint, a copy of the lien account, with description of the property charged therewith, verified, and alleged to be of record in the office of the county clerk and recorder of said county. Defendants Collins and Lepley answered the complaint, and the trial ensued, whereat plaintiffs, to establish their cause of action, called, as a witness, Howard Crosby, county clerk and recorder of said county, who, after stating his said official position, identified the original lien account, verification, and description of the property charged therewith, as a document filed in said recorder's office at the

time stated in the filing indorsement thereon. The record recites that this paper "was then offered by plaintiffs to be marked for identification, and was received and marked 'Exhibit A.'" A second paper was also identified by said witness as of record in said recorder's office, filed of the date indorsed thereon. This latter paper purports to be an assignment of said lien account, on file in the recorder's office, as aforesaid, by Morgan, to plaintiffs; and the record shows that, after its identification by the recorder as one of the records of his office, said assignment was "offered to be marked for identification, and so received and marked 'Exhibit B.'" Thereupon said Morgan was called as a witness on behalf of plaintiffs, and, in answer to questions, testified as follows: "My name is F. M. Morgan. I resided in Great Falls during the year 1890. I was in the architect business, and also a dealer in special building materials. I know the building known as the 'Collins & Lepley Block,' in the city of Great Falls, Montana. It is situated on lots 8 and 9, block 366, Great Falls, Montana. To my own knowledge, defendant H. A. Anderson had the contract for the erection of that building, and had said contract from said Collins and Lepley. I bargained, sold, and delivered to said H. A. Anderson material for the construction of that building." Witness was then shown plaintiffs' exhibit marked "A," for identification, and said: "I have examined the schedule which forms part of the paper shown me, and recognize it to be a list of materials I sold Anderson for the building in question — the Collins & Lepley Block." The witness was then asked the following question: "State whether or not you know whether these materials ever entered into the construction of that building, and, if so, on what dates they were furnished to said building." Thereupon defendants objected to this question, "upon the ground that, before witness can testify that the materials went into the building he must show that he filed a lien upon this property. Objection sustained by the court, to which ruling defendants duly except." This ruling is assigned by plaintiffs, who are appellants here, as error.

The ground of the objection relates simply to the order of introducing proof, and on that score it does not appear to have any foundation whatever in reason. As a matter of logical and

orderly procedure in the proof, it would seem to be as appropriate to first show that the materials were furnished and used in the structure, and then show the filing of the lien, as to reverse the order of showing those facts. The furnishing of material must precede filing of lien, in order to make the lien applicable. The order of introducing proof, condemned by the objection, was the chronological order in which the facts must have arisen, if existing, and was the order in which such facts were alleged in the complaint. The record shows that the original lien account, on file in the recorder's office, had been produced by the recorder, proved as one of the records of said office, and "was then offered by plaintiffs, to be marked for identification, and was received, and marked 'Exhibit A,'" and was in the hands of the witness when the objection under consideration was interposed. The objection appears to be wholly capricious, and ought not to be sustained. The order of admitting proof rests in the sound discretion of the court, and that discretion is usually exercised to allow a deviation from a strictly logical order, if the exigency of the occasion demands it, or the convenience of witnesses or counsel would be subserved thereby, or waste of time avoided, and no disadvantage would result to the adverse party. What difference could there be in effect on the adverse party if the furnishing of the material was first shown, and then the filing of the lien? It should always be recognized that counsel bear an important part in the trial of an action, as advocates of litigants seeking justice at the hands of the court. In the arrangement of the case for trial, in the calling and interrogation of witnesses, the introduction of documentary evidence, the formation of findings and instructions to be asked for, the preparation for argument of the cause, and in the multitude of other cares which press upon counsel in the trial of a case, they have more important responsibilities to absorb their attention than to study whether each item of evidence, as produced, would meet the approval of the most punctilious critic of its logical sequence; and counsel have a right to complain when, in their attempt to present the cause of a suitor, objections are sustained by the court which have no foundation in reason or in fact, and which result only in embarrassment. It is observed that counsel for respondents do not

attempt to support the objection under consideration, or the ruling of the court thereon. The above-mentioned objection having been sustained, counsel for plaintiffs offered in evidence the lien account theretofore proved, to which objection was interposed on several grounds, only two of which appear to be relied on to support the ruling of the court sustaining that objection, and refusing to allow the lien account to be admitted in evidence.

The first point relied on to support such ruling, as appears from respondents' brief, is that "the complaint failed to state facts sufficient to constitute a cause of action against respondents, and they made timely objection to any evidence in the cause, upon that ground. There is no allegation of the complaint, or in the claim of the lien, stating that the material was furnished for the building upon which the pretended lien is claimed." The record shows no such ground stated in the objection to the admission of said lien account in evidence. Moreover, the complaint is not wanting in this respect. The complaint, among other allegations, alleges that "defendant H. A. Anderson, entered into a contract with defendants Timothy E. Collins and John Lepley to furnish the materials and erect upon the land herein above described a three-story brick building, known as the 'Collins and Lepley Block,' for them, the said defendants; and plaintiffs allege that in pursuance of said contract, so made and entered into by said Anderson, in the year 1890, and previous to the 27th of June of said year, the said defendant Anderson, did proceed to erect and construct said three-story brick block, known as the 'Collins and Lepley Block,' upon the land hereinbefore described; and, while so carrying out said contract, the said defendant Anderson did purchase of one F. M. Morgan, then of the city of Great Falls, Cascade county, Montana, windows, frames, stairs, doors, inside furnishing material, lumber, etc., for the purpose of erecting therewith the said brick block, and which were used in and entered into the construction of said brick building aforesaid, on the land hereinbefore described, of the value in the aggregate, and for the agreed and stipulated sum of two thousand six hundred and ninety-five and fifty-six one-hundredths dollars (\$2,695.56)." Therefore the ruling of the court excluding

said lien account could not be sustained, on the ground that the complaint was insufficient in the respect urged, even if that had been made a ground of objection when the lien account was offered.

Respondents also urge that the lien account offered should be rejected as insufficient to constitute a lien, in that the same is not itemized as required by law. The lien account tendered by copy, as an exhibit to the complaint, is itemized with great particularity as to the various materials alleged to have been furnished. The account in question is a long one, and a portion will suffice to illustrate the whole of it in the respect mentioned. It commences as follows:

GREAT FALLS, MONT., DEC. 16, 1890.

H. A. Anderson, Contractor for Collins and Lepley Block, lots 8 and 9, block 366, city of Great Falls, to Frank M. Morgan, Dr.

Sept. 1, 1890.

8 windows, 4 lights	13"x42"x1 $\frac{1}{2}$ "	glazed, single strength.
2 " 4 "	14"x36"x "	" " "
1 " 4 "	14"x28"x "	" " "
1 " 4 "	20"x24"x "	" " "

Sept. 11, 1890.

3 windows, 4 lights	12"x30"x1 $\frac{1}{2}$ "	glazed, single strength.
2 sash 2 "	12"x13"x "	" " "
1 " 4 "	14"x13"x "	" " "

—And so continues, describing the several classes of materials, with apparently the same particularity throughout. The point, however, upon which respondents press their objection, is that the account does not show the price of each particular item. Near the close of the account is a statement as follows: "The foregoing, per price agreed, \$2,585." Then follows a statement of other items of materials and prices, making a total of \$2,695.56, the amount for which this suit is brought. We hold this account sufficiently itemized. It contains ample information to all parties concerned to enable them to investigate as to whether the materials set forth in the account went into the structure, and as to the reasonable value thereof. The items of materials alleged to have been furnished are so particularly set forth in said account that any person informed as to the reasonable value of such wares can readily ascer-

tain whether the aggregate price set down is just and reasonable. Therefore we cannot sustain the ruling of the court excluding said lien account on the ground that it is not sufficiently itemized.

Certain other alleged reasons for rejecting said lien account were stated in the objection thereto, but have not been urged on this appeal in support of the ruling of the court, nor do we deem those reasons pertinent or sufficient; but, inasmuch as it is uncertain upon what particular ground the court sustained the objection, and it being necessary to remand the case for trial, we will briefly notice the other alleged grounds of the objection, in the order set forth in the record.

The first is "that the paper purporting to be a lien is in no wise a charge upon the property described in the complaint and in the lien." This specifies no ground or reason for rejecting the account, and therefore, as an objection to the admission of evidence, it must be disregarded.

The second alleged ground of objection to the admission of the account in evidence is "because the statute of Montana under which said lien is supposed to have been filed does not provide a lien for a sub-contractor unless that sub-contractor has a contract relation with the owner of the property." This alleged ground is out of place as an objection to the admission of said lien account in evidence. It is asking the court, at this incipient stage of the case, to consider whether the evidence offered by plaintiffs is sufficient in law to sustain a decision in his favor, and not whether the evidence offered is relevant and competent to establish some material allegation of the complaint. If the law does not provide for a lien in favor of a sub-contractor unless he occupy the contractual relation mentioned, and on the close of proof no such relation had been shown, it would be time enough to raise that question on the summing up of the case. In offering in evidence the original lien account, tendered by copy attached to the complaint, as part thereof, the plaintiffs were simply attempting to prove the allegations of the complaint by competent evidence. If the complaint was insufficient in stating a case for a lien upon said property, that question of law should have been raised by demurrer.

The third alleged ground is that "the pretended lien is insufficient, because the same is not itemized, as required by law." And the fourth ground is like unto the third, namely: "Because the account attached to the pretended lien, and filed therewith, does not show the value, or reasonable value, of the items therein set forth." These grounds of objection have been already considered.

The fifth ground, as stated, is: "Because there is nothing in said lien, or account therewith filed, which in any manner operates as a notice to the defendants, or to either of them, of the materials, and the value thereof, which are alleged to have been furnished for said building." This ground of objection also raises a question of law as to the sufficiency of the lien tendered in the complaint; and the further question whether the law providing for liens requires such special notices as this ground of objection seems to contemplate. It would have been more appropriate to raise these questions by demurrer, inasmuch as the lien account filed in the office of the county recorder was made part of the complaint; but, not having been raised at that proper time, it is time enough to consider that question after the evidence is in, and the court comes to the consideration whether the law would apply a lien upon the facts shown. Objecting to the introduction of the alleged lien account in evidence on the fifth ground, and on some others stated, is no more than undertaking to say that plaintiffs cannot be allowed to prove the allegations of their complaint after time for demurrer has passed, and those allegations have been answered, and the issue thus raised is being tried.

The sixth alleged ground, as stated, is that plaintiffs "allege upon a contract, and the account filed with the notice of lien claims \$2,585, as per agreement, and another amount, which makes \$2,682, as the reasonable value." Plaintiffs allege in their complaint the price of the goods furnished as being the value thereof, and also as being the agreed price; and the facts pointed out by this ground of objection are not at all inconsistent with the allegations of the complaint. Judgment reversed, and cause remanded for trial.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

MARTIN, APPELLANT, v. FLAHARTY, RESPONDENT.

[Argued November 7, 1892. Decided February 6, 1893.]

DEEDS—Delivery.—It is not an absolutely essential requisite to the validity of a deed that there be a manual delivery to the grantee, but when there is an intention manifested by acts or by words on the part of the grantor to make the instrument his deed the delivery is complete.

SAME—Sufficiency of delivery as between grantee and grantor's administrator.—Where it did not appear that the grantor of lands had ever made a manual delivery of the deed to her daughters who were the grantees, but that on the day the deed was executed had received from them a life lease of the same lands as were conveyed and some months later in company with one of the grantees deposited the deed and lease in a bank with a written direction thereon that they be delivered to her, and, in case of her death, to one of the grantees, after which she spoke of the "girl's deed" as being in the bank, and occupied the premises until her death, such facts show a delivery of the deed and complete consummation thereof before the death of the grantor.

Appeal from Ninth Judicial District, Gallatin County.

Ejectment. The cause was tried before ARMSTRONG, J., without a jury. Defendants had judgment below. Affirmed.

E. P. Cadwell, and J. L. Staats, for Appellant.

There was no delivery of the deed to the property in question to the grantees, or either of them, prior to the death of the grantor, or at all, as shown by the evidence. (Devlin on Deeds, §§ 79, 283; *Fisher v. Hall*, 41 N. Y. 423; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; *Bull v. Foreman*, 37 Ohio, 137; *Jackson v. Leek*, 12 Wend. 107; *Fay v. Richardson*, 7 Pick. 91; *Shurtleff v. Francis*, 118 Mass. 154; *Wiggins v. Lusk*, 12 Ill. 132; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Skinner v. Baker*, 79 Ill. 496; *Gunnell v. Cockerill*, 79 Ill. 79; *Reed v. Douthit*, 62 Ill. 348; *Stinson v. Anderson*, 96 Ill. 373; *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35; *Stihvell v. Hubbard*, 20 Wend. 44.) The lease creates no estoppel. The tenant was in possession at the time she took the lease, and the doctrine of estoppel does not apply. She never accepted the lease, because she never parted with the higher and better emblem of title and right to possession. (*Tewksbury v. Magraff*, 33 Cal. 237.)

Luce & Luce, for Respondents.

Where a deed is found in the grantee's hands, a delivery and acceptance are always presumed. (3 Washburn on Real Property, 262; *Blankman v. Vallejo*, 15 Cal. 639.) The grantor admits delivery by execution and acknowledgment. (*Bensley v. Atwell*, 12 Cal. 232.) Want of delivery should have been alleged and proved, the deed being *prima facie* evidence of its delivery. (Abbott's Trial Evidence, p. 787, n. 1; p. 786, § 4; *Stafford v. Hornbuckle*, 3 Mont. 485; *Osborn v. Hendrickson*, 8 Cal. 31; *Boggs v. Merced M. Co.*, 14 Cal. 307; *Banning v. Banning*, 80 Cal. 271; 13 Am. St. Rep. 156; *De Arnaz v. Escandon*, 59 Cal. 486, 489; Comp. Stats., § 286, p. 665; Comp. Stats., § 263, p. 662.) The appellant should not be heard to question the effect of the deed in any manner. Being produced by the respondents and duly acknowledged, the presumption is that it is in every respect valid, and imports verity. (*Branson v. Caruthers*, 49 Cal. 374.) If the facts attending the execution of the instrument show that the party executing it intended it to become immediately operative and binding without any further act of ceremony on his part, there is sufficient proof of an effectual delivery, whoever may afterwards take possession of the document. (*Doe v. Knight*, 5 Barn. & C. 671; *Souverbye v. Arden*, 1 Johns. Ch. 240; *McLure v. Colclough*, 17 Ala. 89; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Farrar v. Bridges*, 5 Humph. 411; 42 Am. Dec. 439.) Even if the delivery was not prior to the deposit of the deed, that act operated as a delivery. (*Belden v. Carter*, 4 Day, 66; 4 Am. Dec. 185; *Woodward v. Camp*, 22 Conn. 461; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313, approving *Hathaway v. Payne*, 34 N. Y. 92.) A deed need not be actually delivered if the grantor intends the execution to have the effect of a delivery and the parties act upon this presumption. (5 Am. & Eng. Ency. of Law, p. 447, and cases cited in notes 3-5.) Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts or both combined, is sufficient. (2 Wait's Actions and Defenses, 494, and cases cited; *Newton v. Bealer*, 41 Iowa, 334.) The grantor was estopped by the acceptance of the lease from denying the title

of the defendants. It was an acknowledgment of their title. (*McLaughlin v. Mitchell*, 121 U. S. 411; *McConnell v. Bowdry*, 4 Mon. T. B. 400; *Hall v. Butler*, 10 Ad. & E. 205; *Ingraham v. Baldwin*, 9 N. Y. 45. See also *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609-18; *Jackson v. Spear*, 7 Wend. 401; *Jackson v. Smith*, 7 Cowen, 718; *Jackson v. Ayers*, 14 Johns. 225; 1 Washburn on Real Property, 358, 359, ¶ 4. See dissenting opinion of Justice Sawyer in *Tewksbury v. Magraff*, 33 Cal. 249, bottom of page 254.) The doctrine in *Tewksbury v. Magraff* is largely modified in *Peralta v. Ginochio*, 47 Cal. 459, and is repudiated in *Mason v. Wolff*, 40 Cal. 250, as to its application in certain cases. (See also *Abbey Homestead Assoc. v. Willard*, 48 Cal. 614; *Pacific M. L. Ins. Co. v. Stroup*, 63 Cal. 153.)

PEMBERTON, C. J.—This is a suit in ejectment instituted in the court below by appellant as administrator of Rebecca Githens, deceased. The complaint is such a one as is ordinarily employed in such actions. The answer contains a denial of all of the material allegations contained in the complaint, and alleges affirmatively that the deceased was not the owner of the demanded premises at the time of her death, but was the tenant of the respondents; that, as she did not die seised of any estate in the premises, her administrator, the appellant, cannot maintain this action. Both parties in the court below having expressly waived a jury, the case was tried by the court. The findings and judgment of the court below were in favor of the respondents. The appellant filed his motion for a new trial, which was overruled, and from the order of the court, overruling his motion for a new trial, this appeal is taken.

The facts of the case are substantially as follows: "The deceased, Rebecca Githens, was the mother of the respondents. On the second day of January, 1888, the deceased, who was then seised in fee of the premises in dispute, executed a deed to the demanded premises to the respondents. On the same day the respondents executed a lease to the same premises to the deceased for the term of her natural life, and delivered the same to the deceased. The proof is not positive that the deed was actually then delivered by the grantor to the grantees; that is, by manual delivery. Some months after the execution of

the said deed and lease, the deceased, in company with Mrs. Flaharty, one of the grantees, took both of said instruments to the Gallatin Valley Bank, and delivered them to the assistant cashier. This inscription was written on the outside of said paper: To deliver to Mrs. Githens, and, in case of her death to Mrs. Flaharty." Mrs. Githens died some months after the delivery of these papers to the bank, without even calling for them, and without even attempting or expressing any desire to regain the possession of them. After the death of Mrs. Githens the papers were delivered to Mrs. Flaharty. While these papers were in the bank, Mrs. Githens spoke of them to witnesses, saying the "girls' deed" (meaning the respondents) was in the bank. The evidence also shows that the deceased occupied the demanded premises under said lease from its execution until her death. After the death of Mrs. Githens the respondents took possession of the demanded premises, and have exercised control thereof ever since. The deceased, in her lifetime, while said papers were in the bank, spoke of both the deed and lease being in the bank, and of the deed as belonging to the respondents. Upon this showing of facts appellant contends there was no delivery of said deed, that the deceased never lost control over it during her lifetime, and that the delivery thereof was void. Counsel for the appellant concedes that if the deed was delivered he has no case. Respondents, of course, claim that the deed was delivered. What, then, is a delivery? And how can the delivery be shown?

In the 5 American and English Encyclopedia of Law, page 447, we find this doctrine asserted: "The intention always controls the determination of what constitutes a sufficient delivery; and it may be manifested by acts or by words, or by both, in the most informal manner. But either acts or words manifesting the intention must be present, in order to constitute a good delivery. But the deed need not be actually delivered, if the grantor intends the execution to have the effect of a delivery, and the parties act upon this presumption. Delivery will be presumed from the fact that the deed was executed before the witnesses, and declared to be delivered in their presence." And see cases cited in notes.

In Washburn on Real Property (vol. 3, 5th ed., p. 305, par.

28) the author says: "Thus, a deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker; and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the mean time have deceased." See authorities cited in note.

In *Delvin on Deeds* (vol. 1, § 262) the author holds the doctrine of delivery of a deed to be one of intention: "As no particular form of delivery is required, the question whether there was a delivery of a deed or not, so as to pass title, must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. 'The doctrine seems to be settled beyond a reasonable doubt,' remarks Justice Atwater, 'that where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, though the deed remains in the hands of the grantor. . . . The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee; and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee.' A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law. A deed was held complete and valid where it had been prepared for execution, read, signed and acknowledged before a proper officer, notwithstanding the testimony of the witnesses present at its execution that there was no formal delivery, and the fact that the deed, after the grantor's death, was found among his private papers in his desk."

In *Doe dem. Garnons v. Knight*, 5 Barn. & C. 671; 11

E. C. L. 632, Bayley, J., holds that "where a party to an instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential"; and cites a great number of cases in support of this doctrine.

In *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66, a case very similar to the one at bar, Parsons, C. J., delivering the opinion of the court, holds that "a deed signed, sealed, delivered, and acknowledged, which is committed to a third person, as the deed to the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently; and the third person is a trustee of it for the grantee."

In *Woodward v. Camp*, 22 Conn. 459, 460, Waite, J., speaking of what constitutes a valid delivery of a deed, says: "And, in order to constitute a valid delivery, it is not necessary that it should be delivered personally to the grantee. It will be sufficient if delivered to some third person for the use of the grantee, although the latter was not present at the time, had no knowledge of the existence of the deed, and never gave any authority to the person receiving it to act in his behalf. (*Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315.) And if a deed be delivered to a third person, to be by him kept, during the life of the grantor, subject to his order, and at his death, if not previously recalled, to be delivered over to the grantee, and the grantor die without having recalled the deed, such delivery will become effectual, and the title of the grantee consummated, in the death of the grantor. (*Belden v. Carter*, 4 Day, 66; 4 Am. Dec. 185.) According to these authorities, had the deed, in the present case, been delivered to some third person, to have been kept during the life of Mrs. Camp, and then delivered to the grantee, such delivery, upon her death, would have become perfected, and the title would have vested in him."

In *Farrar v. Bridges*, 5 Humph. 411; 42 Am. Dec. 439, the court say: "A formal, ceremonious delivery of a deed is not

essential to its validity. If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing, and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor or grantor." (See authorities cited.)

In *Thatcher v. St. Andrew's Church*, 37 Mich. 269, speaking of what constitutes the delivery of a deed, the court say: "The act of delivery is not, necessarily, a transfer of the possession of the instrument to the grantee, and an acceptance by him; but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument. The deed may be delivered to the grantee, or to a stranger unknown to the person for whose benefit it is made; and it has been held that such was a good delivery, when assented to by the grantee after the death of the grantor." (See authorities cited.)

In *McLure v. Colclough*, 17 Ala. 96, the court say, speaking of what constitutes delivery: "Then, although there was no delivery by the hand, there was enough to constitute a good delivery in law. This may be accomplished by mere words, or by such words and actions as indicate a clear intention that the deed shall be considered as executed, as when a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and actual delivery to the party who is to take by the deed, or to any person for his use, is not essential." (*Doe dem. Garnons v. Knight*, 5 Barn. & C. 671.)

In *Belden v. Carter*, 4 Day, 66; 4 Am. Dec. 185, a Connecticut case, depending on this statement of facts: "Delivery of deed. When takes effect. A grantor, having signed, sealed, and acknowledged a deed, took it up, in the absence of the grantee, and said to another: 'Take this deed and keep it. If

I never call for it, deliver it to B. after my death. If I call for it, deliver it to me.' The party then took the deed, and the grantor dying soon afterwards, and never having called for it, it was delivered to the grantee." Upon these facts the court say and hold: "The grantor delivered the deed to Wright with a reservation of a power to countermand it, but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery."

In *Newton v. Bealer*, 41 Iowa, 334, in a case nearly on all fours with the case at bar, Day, J., delivering the opinion of the court, on page 339, says: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because, during life, he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect because the intention might have been changed. Applying this doctrine to the deed in question, there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make. When within a very few days of his death, and evidently, as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be found, which, as he supposed, had the effect to fix his property so that there

would be no ‘fussing’ about it when he was gone. He thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property, and any construction of the law which ignores this intention, and defeats this purpose, prefers shadow to substance.” (See cases cited.)

In *Hathaway v. Payne*, 34 N. Y. 92, a case wherein the facts are as nearly like the facts in the case at bar as usually happens, the court hold that, “ where a deed is to be delivered to the grantee on the death of the grantor, the title, by relation, passes at the time the deed was left for delivery.” Potter, J., delivered the opinion in this case, and after viewing at great length the facts, in stating the law and citing the authorities, says: “ Looking to the language of the agreement itself, for the purpose and intent of this conveyance, it left no condition to be performed before delivery. It required nothing but the lapse of time, to wit, the death of both grantors, when Herrendean, the agent, trustee, or depositary of the deed (by whatever name he may be called), by mutual direction of the parties, not alone that of the grantor, who alone could not revoke a mutual agreement, immediately to deliver it, as a good and valid conveyance of all the lands therein contained. If we look at the intent of the parties to the deed, as manifested by their acts, independent of the language of their agreement—the one granting, the other accepting the grant of, this part of the same premises—it is equally apparent that the parties intended the first deed as a present conveyance. In *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375, A. executed a deed of lands, in consideration of natural love and affection, to his two sons, and delivered it to C., to be delivered to his sons in case A. should die without making a will; and, A. having died without a will, C. delivered the deed to the sons. It was held that this was a valid deed, and took effect from the first delivery; that this was not an escrow. In *Tooley v. Dibble*, 2 Hill, 641, a father signed and sealed a deed purporting to convey to his son a farm, placing the deed in the hands of B., with instructions to deliver it after the father’s death, but not before, unless both parties called for it; and after the father died B. delivered the deed accordingly. It was held that the title of the son took effect, by relation, from

the time the deed was left with B., and that the son's quitclaim, executed intermediate the leaving the deed with B., and the father's death, though importing a mere conveyance of the son's 'right in expectancy' in the land, would pass his title. The cases of *Goodell v. Pierce*, 2 Hill, 659, and *Hunter v. Hunter*, 17 Barb. 25, are but confirmations of this view of the title taking effect from the first delivery of the deed. In the case of *Belden v. Carter*, reported in 4 Day, 66; 4 Am. Dec. 185, a deed was delivered to a third person to keep, and, if not called for, to deliver it after the death of the grantor. It was held that by legal operation it became the deed of the grantor presently, and that the depositary held it as a trustee for the use of the grantee, and that the title became consummate in the grantee by the death of the grantor, and the deed took effect, by relation, from the time of the first delivery. In the case of *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66, a distinction is made which I regard as sound, and which I think has not been questioned since, that applies to this case. It was held that a deed, signed, sealed, delivered, and acknowledged, which is committed to a third person as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently, and the third person is a trustee of it for the grantee. But if it be delivered to the third person as the writing or escrow of the grantor, to be delivered on some future event, it is not the grantor's deed until the second delivery. That is, its being a present deed depends upon the fact whether it was delivered as an escrow. The cases can be multiplied, each varying from every other by some nice shade of difference, upon the question whether, in the present case, the deed was an escrow in the hands of the depositary, or whether the depositary was made the trustee of the grantor. In the former case a second delivery is generally required before the title passes; in the latter, the title passes at the instant of delivering the deed to the depositary. This, I think, is the true distinction. In the case at bar there was no direction by the grantors that the deed was left as an escrow, and it presents no evidence of intent on the part of the grantors to make this deed an escrow. There is no condition mentioned in the agreement, to be performed before delivery, which in law would create it an escrow;

and presumptions arising from the language of the agreement, being taken most strongly against the grantor, forbid any implication of its being an escrow. I think, therefore, that if the case depended upon this point, raised by the plaintiff on the assumption that there was no such delivery of the deed of 1839 as to pass the title to the defendant, he must also fail. There is another reason, which exists both at common law and by the statute (which adopted the common law in this respect), which is controlling—"that, in the construction of every instrument creating or conveying any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." And, in the case just cited, Denio, C. J., dissents from part of the opinion of the court, but agrees with the court as to the law concerning the delivery of deeds in such cases, and, on page 113 of the opinion cited, says: "They do [referring to cases cited on the question as to what is a sufficient delivery of a deed], however, I think, prove that a deed may be delivered to a third person, as this was, with instructions to be finally delivered to the grantee after the death of the grantor. In such a case the weight of authority is that no title passes until the final delivery, and that then and thereafter the title is, by relation, deemed to have vested as of the time of the first delivery to the third person. If it were an original question, I should suppose that such a transaction was of a testamentary character, and that it would be inoperative, for want of the attestation required by the statute of wills. But the cases establish the rule as I have stated, and they should not now be disturbed." See authorities he cites on this point.

Authorities might be cited to any extent in support of the doctrine that a manual delivery of a deed is not an absolutely essential requisite to its validity; that "the question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." In this case the grantor having executed the deed to the grantees, and having received back from them at the same time a lease for the term of her natural life, for the same premises, and she having accepted said

lease, depositing it, with the deed to the demanded premises, with the depositary, with instructions to deliver the deed to the grantees in event of her death, and having never recalled the deed, or made any attempt or expressed any desire to regain control thereof, but in the mean time spoke of the deed as being the deed of the grantees, in the hands of the depositary, and occupied the premises as the tenant of respondents, and in all respects having treated the deed as belonging to the grantees, and both parties having acted concurrently upon the theory that the deed was complete, as well as the delivery thereof, the opinion seems irresistible that the facts show a valid delivery of the deed in this case. Many of the authorities cited in this opinion have been so cited, not that we deemed it necessary to a determination of the case at bar, but more for the purpose of showing the trend of the authorities, and the extent to which they go in support of the doctrine discussed in this case. Some of these authorities go further than perhaps this court would go under like circumstances; but they all support the position we take—that in the case at bar there was a valid delivery of the deed. The acts, words, and conduct of the parties—especially the giving of the lease to the demanded premises by the grantees of the deed to the grantor contemporaneously with the execution of the deed, and her occupying the premises under said lease until her death—establish beyond controversy that the parties considered the deed complete, as well as the delivery thereof. This opinion is not to be interpreted as establishing any new rule in relation to the testamentary disposition of property, or as expressing any opinion as to the rights of creditors in cases resting upon like facts and circumstances. We simply decide that in this case there was a delivery of the deed, and complete consummation thereof, before the death of the grantor.

Judgment of the lower court is affirmed.

Affirmed.

HARWOOD, J., and DE WITT, J., concur.

STEVENSON, APPELLANT v. MATTESON ET AL., RESPONDENTS.

[Argued June 24, 1892. Decided February 6, 1893.]

JUDGMENT—Entry on demurrer—Effect of consent.—Where a plaintiff elects to stand on his complaint after demurrer sustained, it is the duty of the court to render judgment against him for costs so as to place him in a position to appeal; and where the plaintiff is compelled to ask the court to enter such judgment, it is not such a consent to the judgment as to debar him of the right to appeal.

SAME—Finality.—A judgment sustaining a demurrer and dismissing the complaint as to one of several defendants, is a final judgment from which an appeal will lie.

ASSIGNMENT—Action to annul pleading.—In an action to set aside an assignment for the benefit of creditors as fraudulent, both assignors and assignee being made parties defendant, it is not necessary that the complaint should allege knowledge on the part of the assignee of the matters alleged in the complaint to be fraudulent.

SAME—Same—Assignee proper party defendant.—An assignee, by reason of having possession of the assigned property and goods, and by reason of having a right to defend the assignment, is a proper party defendant to an action to have such assignment declared void.

SAME—Same—Duty of court as to creditors.—It is the duty of the court upon the filing of a complaint by a creditor to set aside an alleged fraudulent assignment to make such orders in relation to the assigned estate as may be necessary to preserve it for the benefit of rightful creditors, as by the appointment of a receiver, so as to render available any judgment that might be rendered on the final determination of the action.

Appeal from Eighth Judicial District, Cascade County.

Action to set aside an assignment made for the benefit of creditors. Assignee's demurrer to the complaint was sustained by BENTON, J., and judgment for costs rendered against plaintiff. Reversed.

F. C. Park, for Appellant.

Leslie & Downing, for Respondents.

PEMBERTON, C. J.—This is a suit brought in the lower court by appellant to set aside, and have declared void, a certain deed of assignment. On the sixteenth day of January, 1892, George L. Stevenson and Ernest W. Ryder, Jr., who claim to be copartners doing business at Great Falls, in Cascade county, Montana, under and in the firm name and style of Stevenson & Ryder, executed their deed of assignment to one S. W. Matteson, Jr., conveying to him their stock of general

hardware, harness, etc., for the benefit of the firm's creditors. The deed was duly executed by Stevenson & Ryder, and accepted by Matteson, assignee, who took charge and possession of the stock of goods. The deed of assignment names but two preferred creditors, to wit, the First National Bank of Great Falls, in the sum of one thousand eight hundred dollars, and one James Bleecker, Jr., of New York, in the sum of three thousand dollars. The complaint alleges that on the sixteenth day of January, 1892, the date of the said assignment, and for a long time prior thereto, Stevenson & Ryder, the assignors named in said deed of assignment, and James Bleecker, Jr., the preferred creditor named in said deed of assignment, were, and had been, copartners doing said business as such in the city of Great Falls, in the firm name of Stevenson & Ryder, and also were engaged in business in the city of New York, in the firm name of Stevenson and Company; that, according to the terms of the articles of copartnership existing between said three copartners, all matters of importance, and all large and important purchases and sales of stock, were to be submitted to all three of the members of said firm, doing business at Great Falls, before being entered into or consummated; that Stevenson and Ryder, two members of said firm, made the assignment without consulting Bleecker, who could have easily been consulted by telegraph, as was often done; that Bleecker did not consent to said assignment, or authorize it, but immediately repudiated it after hearing of it; that said Bleecker was fraudulently made a preferred creditor, in and by said deed of assignment, to the amount of three thousand dollars, because said firm of Stevenson & Ryder did not owe, nor did either member of said firm owe, Bleecker said sum, or any sum whatever, and, further, because said Bleecker was a member of the assigned firm; that said preferred claim of three thousand dollars allowed Bleecker, and the whole of it, was fictitious, false, and fraudulent, and was allowed and preferred for the purpose of hindering, delaying, and defrauding the creditors of said firm; that, if said fraudulent and preferred claim of Bleecker is paid and allowed by the assignee, there will not remain sufficient assets of said assigned estate to pay the claim of appellant. The complaint shows that the assignee received about four thousand dol-

lars' worth of property. The complaint also shows that on the twentieth day of February, 1892, the appellant recovered judgment in the lower court against respondents Stevenson and Ryder, and Bleeker, copartners doing business in Great Falls in the firm name of Stevenson & Ryder, in the sum of nine hundred and sixty-four dollars, which remains unpaid; and the sheriff of said county, being unable to satisfy an execution issued out of said court on said judgment, has returned the same *nulla bona*. The appellant asks that said deed of assignment be declared null and void, and be set aside, and for other relief. To the complaint the respondent Matteson filed a general demurrer, as follows: "Now comes the defendant S. W. Matteson, and demurs to the second amended complaint in this action filed by the plaintiff, and for cause of demurrer alleges the said amended complaint does not state facts sufficient to constitute a cause of action, and of this he demands judgment of the court." The court below sustained this demurrer, and, the appellant declining to plead further, the lower court dismissed the complaint as to respondent Matteson, and rendered judgment against appellant for costs. From this judgment the appellant prosecutes the appeal.

The respondents defend the action of the court in sustaining the demurrer and dismissing the action as to respondent Matteson, on the ground that judgment was rendered on the application of appellant. The appellant declined to further plead after said demurrer was sustained, because he believed he had stated a good cause of action in his complaint as to Matteson, as well as to the other respondents, and had perhaps stated all the facts he could state in an amended complaint. It was his right, in that case, to stand on his complaint, and, in the event he did so, it was the duty of the court to render judgment for costs, so as to place the appellant in a position to appeal; and his asking the court to do its duty, or to render such judgment as would allow of an appeal, was not such a consent to the judgment as to debar him of the right to appeal. (See § 244, div. 1, Comp. Stats.) In *Connor v. McPhee*, 1 Mont. 78, Knowles, J., says: "The first question presented in this case is one of practice. Can the plaintiffs in an action move to set aside a nonsuit, when they have consented to it, upon its becoming

apparent, from the rulings of the court, that they could not recover, basing their motion upon alleged error in the rulings of the court, which induced them to consent to the nonsuit? Such practice we hold proper." (See *Natoma etc. Min. Co. v. Clarkin*, 14 Cal. 544.) In the case at bar the appellant was so placed, after the sustaining of the demurrer, that he was compelled to ask the court to enter the proper judgment, so he could appeal, basing his appeal upon the alleged error of the court in sustaining the demurrer of respondent Matteson. The judgment sustaining the demurrer and dismissing the case as to respondent Matteson was final as to such respondent in this case.

The respondents further contend that the demurrer of respondent Matteson should have been sustained, because the complaint contained no allegation that he (Matteson), the assignee, had knowledge of the matters alleged in the complaint to be fraudulent. Respondent Matteson was a proper party to this suit, because he was the assignee, and had possession of the assigned goods and property which the complaint alleges to have been fraudulently assigned, and was presumably disposing of the property for the purpose of paying off the preferred credits, the principal one of which was alleged to be fictitious and fraudulent. Matteson also had a right to defend the assignment, and for that reason alone was a proper party. Whether there was any allegation in the complaint implicating him in the alleged frauds is immaterial. It was the right and duty of the court, upon the filing of the complaint, to make such orders in relation to the assigned estate as were necessary to preserve it for the use and benefit of the rightful creditors, so as to render available any judgment that might be rendered in the final determination of this cause. The court could have appointed a receiver to hold and care for the assigned estate until final judgment herein, so that, if the appellant should succeed in this action, there would have been something of the estate left, out of which he could satisfy his claim. To sustain the demurrer and dismiss this cause as to Matteson would simply be permitting Matteson to carry out the terms of an assignment alleged to be fraudulent, and leave the rightful creditors of the assigned estate remediless, in the event of the

assignment being declared void. The judgment of the lower court is reversed, and the cause remanded, with instructions to overrule the demurrer of respondent Matteson, and proceed with the case in accordance with the views herein expressed.

Reversed.

HARWOOD, J., and DE WITT, J., concur.

18	112
15	510
15	540
33*	418
39*	740
39*	860

STATE, RESPONDENT, v. HUDSON, APPELLANT.

[Argued January 26, 1893. Decided February 27, 1893.]

CRIMINAL LAW — Uttering void instrument — Venue. — In a prosecution for uttering a forged instrument which was mailed in one county and received in another, the venue is in the county where the letter containing the forged instrument was received and not in the county where it was mailed.

SAME — Same — Jurisdiction. — The mailing of the instrument is not an act requisite to the consummation of the offense of uttering a forged instrument, there being no uttering in such case until the receipt of the letter, and therefore the above rule is not changed by section 82 of the Criminal Practice Act, providing that when a crime has been committed partly in one county and partly in another, or the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties the jurisdiction is in either.

Appeal from Ninth Judicial District, Gallatin County.

Conviction for uttering a forged instrument. Defendant was tried before ARMSTRONG, J. Reversed.

Statement of facts prepared by the judge delivering the opinion.

This is an appeal by the defendant from a judgment upon a conviction for uttering, publishing, and passing an alleged forged instrument. The opinion below treats but one of the several points made by appellant, which may be stated as follows: Information was filed in Gallatin county, charging the offense of uttering, publishing, and passing the forged instrument in Gallatin county. The proof was that the defendant deposited the alleged forged instrument in the United States mail at Three Forks, a postoffice in Gallatin county, directed to the city of Butte, a postoffice in Silver Bow county, to the

Singer Manufacturing Company, the party alleged to be intended to be defrauded by the defendant. The Singer Manufacturing Company, to whom the forged instrument was so sent, received the same at Butte, in Silver Bow county. This was the only testimony as to venue—as to the place where the defendant uttered, published, and passed the instrument. The court instructed the jury, on the matter of venue, that if the state has shown that the defendant mailed the instrument in Gallatin county, state of Montana, addressed to the Singer Manufacturing Company, at the city of Butte, Montana, with the intent, etc., and that the defendant knew the instrument to be false and fictitious, and that the Singer Manufacturing Company received the instrument in the course of mail, that was sufficient. The question now upon the appeal is whether the facts of a mailing of the forged instrument by defendant in Gallatin county, and the due receipt of the same by the Singer Manufacturing Company in Silver Bow county, constituted an uttering, publishing, and passing in Gallatin county. If yes, the venue was proved; if no the venue was not proved, and the judgment must be reversed.

E. P. Cadwell, for Appellant.

Henri J. Haskell, Attorney-General, and *H. C. Cockrill*, for the state, Respondent.

DE WITT, J.—The precise question presented here was thoroughly considered in New York in the case of *People v. Rathbun*, 21 Wend. 509. Mr. Justice Cowen wrote an exhaustive opinion, both upon the reason of the proposition, and upon the authority of the decided cases. The case is a standard citation in the text-books. (3 Greenleaf on Evidence, § 112; Wharton's Criminal Law, § 1451; 2 Bishop's Criminal Procedure, § 428.) In a later case in New York (*People v. Adams*, 3 Denio, 209; 45 Am. Dec. 468), the opinion of the court, after speaking of the principle decided in 21 Wend., and after citing other cases went on to remark: "And to the same effect are the views of the late Mr. Justice Cowen, as expressed in *Rathbun's Case*. And the principle is too reasonable and just of itself, and too

well sustained by adjudged cases, to admit, in my judgment, of any serious doubt." It was held in the Rathbun case that the venue was in the county where the letter containing the forged instrument was received, and not in the county where it was mailed. Upon that theory the venue in the case at bar should be in Silver Bow county, and not in Gallatin county. We are wholly satisfied with Justice Cowen's views, and nothing new occurs to us which would add to the weight of his reasoning or conclusion. The venue was not, therefore, proved in Gallatin county; and the judgment must be reversed, unless our statute has worked a change in the principle announced in the Rathbun case. The Rathbun case discussed the doctrine of an offense being committed partly in one county and partly in another, and concluded that the offense was committed wholly in the county where the letter was received.

Our statute provides as follows: "When a crime has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county, and the court in which the prosecution shall have been first commenced shall have precedence." (Crim. Prac. Act, § 32.) But in the case at bar the crime was not partly committed in Gallatin county. The uttering was the offense. There was no uttering until the receipt of the letter in Silver Bow county. The mailing, as above observed, was not the uttering. Had the letter been cut off in its passage from Gallatin to Silver Bow county, or had it been destroyed, or never received, there would have been no uttering at any place; nor were the acts or effects constituting the offense committed in Gallatin county. That which constitutes the offense was the uttering. If nothing had occurred other than that which occurred in Gallatin county—this is, if nothing had occurred further than the mailing of the letter in Gallatin county—there would have been no uttering, and no offense; nor were the acts or effects requisite to the consummation of the offense committed in Gallatin county. It was not requisite to the consummation of the offense that the letter should be mailed in Gallatin county, or elsewhere. The forged instrument could have gone to the Singer Manufacturing Company by any vehicle other than the

mail. The defendant could have handed it to the Singer Manufacturing Company in person. It may be said that, under the facts in this case, there would have been no uttering —that is to say, the instrument would not have reached the Singer Manufacturing Company, and so be uttered or published —unless it had been put into the mail, and that, therefore, such depositing in the mail was an act requisite to the consummation of the offense. But on the same line of suggestion it can be said that if a person, having determined to murder, starts from Gallatin county, and travels to Silver Bow county, and there accomplishes the crime of murder, if he had not started from Gallatin county he would not have committed the crime in Silver Bow county, and his so starting from Gallatin county was an act requisite to the consummation of the offense. But it would not be contended that the venue for such crime of murder could be laid in Gallatin county. Again, a murderer might buy his pistol in Gallatin county, then go to Silver Bow county, and commit the offense. It then could be said, on the same line of suggestion, that if he had not bought the pistol in Gallatin county the offense would not have been committed, and that, therefore, the buying of the pistol was an act requisite to the consummation of the offense. Illustrations of this nature might be multiplied. Such acts as mailing the letter or buying the pistol, or a murderer traveling through Gallatin county to Silver Bow county, would be, in those particular cases, preliminary to the commission of the offense, and acts without which, in the particular case, the offense would not be committed, but they were not acts requisite to the consummation of the offense. If such acts were construed to be those requisite to the consummation of the offense, there are but few crimes the venue of which could not be construed to be in counties other than the actual county where the offense was committed. We are therefore of opinion, in the case at bar, that the venue of the offense, if any offense were committed, was in Silver Bow county, and that the statute (Crim. Prac. Act, § 32) does not change the principles as announced in the Rathbun case, and generally followed since the promulgation of that decision.

The judgment is reversed; and it appearing that defendant cannot be convicted in said county on the charge of uttering

said instrument in that jurisdiction, it is therefore further ordered that a *nolle prosequi* be entered, and that the court below cause defendant to be discharged from imprisonment on said conviction.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

STATE, APPELLANT, v. HAYES, RESPONDENT.

[Argued January 25, 1893. Decided February 27, 1893.]

CRIMINAL LAW—Larceny by bailee of horse—When not punishable as grand larceny
—*Statutory construction.* — The bailee of a horse, who converts it with intent to steal, and is tried and convicted under section 93 of the Criminal Laws, providing that if any bailee of property convert the same to his own use with intent to steal, he shall be guilty of grand or petit larceny according to the amount or value of the property converted, can not be punished for grand larceny where the value of the horse as alleged is less than fifty dollars, although section 78 of the Criminal Laws makes the stealing of a horse of whatever value grand larceny. Said statute being highly penal the rule of strict construction applies, and, in the absence of any qualifying words in section 93 as "nature" or "character" of property, so as to make the offense and punishment the same under both sections, said section 93 is susceptible of no construction under which the defendant could be convicted.

Appeal from Sixth Judicial District, Park County.

Conviction for grand larceny. Defendant's motion in arrest of judgment was sustained by HENRY, J. — Affirmed.

Henri J. Haskell, Attorney General, and Allen R. Joy, for the State, Appellant.

Matthew R. Wilson, for Respondent.

PEMBERTON, C. J.—On the twelfth day of November, 1892, the county attorney of Park County filed in the court below the following information against the respondent, omitting the caption and formal parts: "In the name and by the authority of the State of Montana, I, Allen R. Joy, county attorney in and for the county of Park, in the State of Montana, who prosecutes for and on behalf of said state, upon information, in the district court of said district, sitting in and for the said county

of Park, and duly empowered to inform of offenses committed within said county, come now here upon information, and give the court to understand and to be informed that one John Hayes, late of said county of Park, aforesaid, at the county of Park, in the state of Montana, and within the jurisdiction of this court, on or about the twelfth day of August, A. D. 1892, then and there being a bailee of property, to wit, one roan mare, of the value of forty dollars, a more particular description of which is to the said county attorney unknown, of the property of one W. F. Kirby, and then and there feloniously converted the same to his own use, and did then and there feloniously sell and dispose of the said roan mare with the intent to steal the same, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Montana." The respondent pleaded not guilty. On this issue the cause was tried by a jury. The jury convicted the respondent, and fixed his punishment at imprisonment in the state prison for a term of one year. After conviction, counsel for respondent filed in the lower court the following motion in arrest of judgment: "(1) Because the information in this action does not state facts sufficient to constitute any offense against the laws of Montana. (2) Because the court had no jurisdiction, for the reason that the property alleged to have been converted by the defendant was stated to be of the value of forty dollars, and the offense, if any, charged in the information, was that of petit larceny." The lower court sustained the motion, and, from the order and judgment sustaining the same, this appeal is prosecuted.

This prosecution was instituted and conducted under section 93, chapter 6, division 5, of the Compiled Laws, and is as follows: "If any bailee of any money, goods, or property shall convert the same to his own use, with intent to steal the same, he shall be guilty of grand or petit larceny, according to the amount of the property or value of the goods, chattels, or property so converted, in the same manner as if the original taking had been felonious; and, on conviction thereof, shall be punished accordingly." The appellant claims that, under the foregoing statute, the respondent could be tried, convicted, and punished as under section 78 of the same chapter, which makes

the stealing of any mare, gelding, colt, etc., grand larceny, without reference to the value of such animal, if it be of any value whatever. It is conceded that the felonious stealing of any of the animals, of whatever value, mentioned in said section 78, is made grand larceny. Section 93, chapter 6, division 4, of the Compiled Laws, provides that if any bailee of any money, goods, or property shall convert the same to his own use, with intent to steal the same, he shall be guilty of grand or petit larceny, according to the amount of the money or value of the goods, chattels, or property so converted, in the same manner as if the original taking had been felonious, and shall be punished accordingly. It will be noticed that in said section 93 no mention is made of the nature of the property converted, as entering into the degree of larceny, of which the party may be convicted, or determining the punishment that may be imposed. The amount of the money, or the value of the property converted, is the criterion by which the degree of the larceny is to be determined, as well as the penalty to be imposed. In the theft of the animals mentioned in section 78, chapter 6, of the Compiled Laws, the value thereof is immaterial, so that the animal is of any value whatever.

Now, then, the question for this court to determine is whether a person tried and convicted under section 93, chapter 6, division 5, of the Compiled Laws, who, being the bailee of a mare, converts her to his own use, with intent to steal, the animal being of a less value than fifty dollars, can be punished as provided under section 78, chapter 6, of the Compiled Laws, which makes the felonious stealing of such animal, of whatever value, grand larceny. The value of the animal alleged to have been converted in this case is stated in the information to be forty dollars. To so hold would require this court to so construe said section 93 to mean that the bailee of any mare, gelding, colt, cow, calf, etc., of whatever value, is guilty of grand larceny, as provided in said section 78. To so hold we must either construe a word into said section 93, such as "nature" or "character," and to hold such words as meaning the same as the words "amount" or "value" of the property converted; or else we would have to hold that said section 93, with the words "according to the amount of money or value of the goods,

chattels, or property so converted," eliminated therefrom, would mean the same as it now reads. We think such a construction would amount to judicial legislation. It is for the legislature to enact the laws. It is the duty of the court to construe them as it finds them. These statutes are both highly penal; and in such cases the rule of strict construction applies.

In Endlich on the Interpretation of Statutes (§ 329) we find this doctrine declared: "To determine that a case is within the intention of a statute, its language must authorize the court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions, so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. In this characteristic, the difference between liberal and strict constructions is clearly presented. Whilst the letter of a remedial statute may be extended to cases clearly within the same reason and within the mischief the act was designed to cure, unless such construction does violence to the language, a consideration of the old law, the mischief, and the remedy, though proper in the construction of criminal as well as other statutes, is not in itself enough to bring a case within the operation of the former class of statutes. Their language, properly given its full meaning, must, at least by that meaning, expressly include the case; and in ascertaining that meaning the court cannot go beyond the plain meaning of the words and phraseology employed, in search of an intention not certainly implied in them. In other words, whilst a case may come within the purview of a remedial statute, unless its language, properly construed, excludes it, it is excluded from the reach of a criminal statute, unless the language includes it. Unless the proper meaning of the language of the statute brings a case within its letter, the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction; and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended, it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language." And in section 330 the same author

says: "It may be here added that the rule of strict construction, in the case of penal statutes, requires that, where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty; that, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

In *United States v. Willberger*, 5 Wheat. 76, Marshall, C. J., delivering the opinion of the court, says: "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would

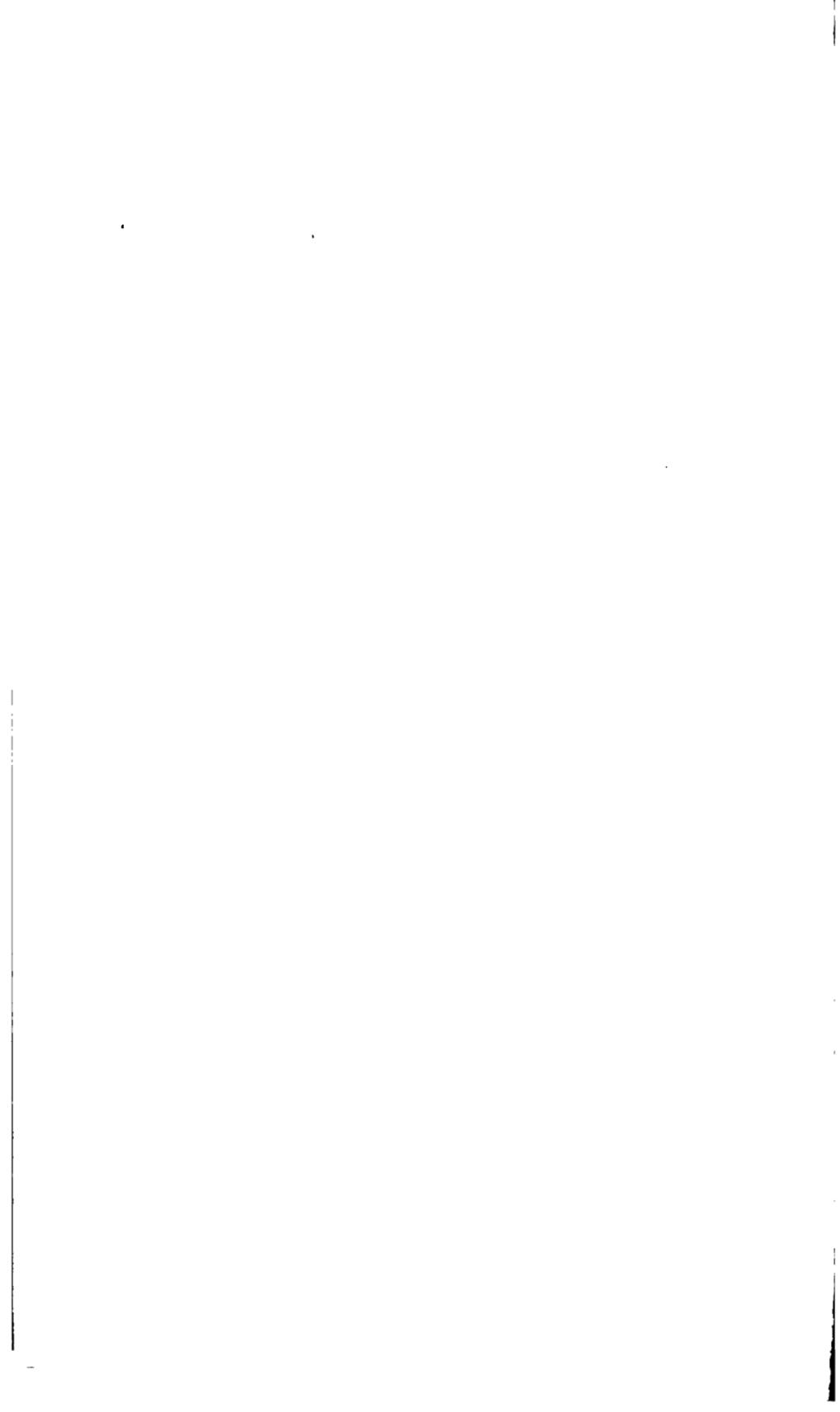
be unsafe to consider as precedents forming a general rule for other cases."

In *Western Union Tel. Co. v. Axell*, 69 Ind. 199, the court say: "A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and necessary meaning of the act creating it." These authorities, and those that might be multiplied, simply but strongly, enunciate the elementary doctrine that penal statutes must be strictly construed.

We are of the opinion that under no construction of which section 93 is susceptible could the respondent have been tried thereunder, on the information alleging the value of the mare converted to be forty dollars, and convicted of grand larceny, and punished therefor as under section 78. If the legislature desire to punish bailees of domestic animals mentioned in section 78, chapter 6, of the Compiled Laws, who convert the same with intent to steal, and treat such conversion as grand larceny, as if the original taking had been felonious, then section 93, chapter 6, division 4, of the Compiled Laws, should be amended by inserting such qualifying words as "nature" or "character" of property, so as to make the offense and punishment the same under both of said sections, as is found to be the case in similar statutes in Missouri and other states. From this view of the case, it is apparent that the lower court had no original jurisdiction to try this cause. The judgment of the lower court is therefore affirmed.

Affirmed.

HARWOOD, J., and DE WITT, J., concurred.



CASES DETERMINED
IN THE
SUPREME COURT
AT THE
MARCH TERM, 1893.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.
Hon. EDGAR N. HARWOOD,
Hon. WILLIAM H. DE WITT, } Associate Justices.

RODONI, RESPONDENT v. LYTLE, APPELLANT.

[Argued November 2, 1892. Decided March 18, 1893.]

13 123
16 116

APPEAL—Sufficiency of record to review evidence and instructions.—Neither sufficiency of the evidence to support a verdict nor objections to instructions will be considered on appeal where the statement on motion for a new trial contains the evidence in the form of a transcript of the stenographer's notes by question and answer, with no attempt to reduce it to narrative form or omit immaterial matter.

SALES OF PERSONAL PROPERTY—Bill of sale as evidence.—In an action against a constable for conversion of personal property taken by him under an attachment against plaintiff's vendor, a written bill of sale from such vendor to plaintiff, although alone it may not have fully proved the sale and delivery was competent evidence, tending, as far as it went, to prove a sale, and was therefore admissible.

Appeal from Second Judicial District, Silver Bow County.

Conversion. The cause was tried before McHATTON, J. Plaintiff had judgment below. Affirmed.

Statement of facts, prepared by the judge delivering the opinion.

This action is for damages for the alleged conversion of personal property. The plaintiff claimed to own the property by purchase from Brennan and Company. The defendant was a constable, and attempted to allege and prove that he took the property lawfully, by virtue of a writ of attachment in a case in which Williams and Saville were plaintiffs, and said Brennan and Company were defendants; that is to say, plaintiff claimed a valid sale and delivery from Brennan and Company to him, and defendant claims that such sale was not valid, as against Williams and Saville, attaching creditors of Brennan and Company. Verdict and judgment were for plaintiff. Defendant's motion for a new trial was denied. From this order, and the judgment, defendant appeals.

Thompson Campbell, for Appellant.

Charles O'Donnell, for Respondent.

DE WITT, J.—The statement on motion for new trial contains the evidence, in the form of a full transcript of the stenographer's notes, by question and answer. There was no attempt made to reduce the evidence to narrative form, and to leave out immaterial and redundant matter. This disregard of the practice of this court has been so often passed upon that the bar are thoroughly familiar with our views. (*Montana Ry. Co. v. Warren*, 6 Mont. 275; *Fant v. Tandy*, 7 Mont. 443; *Sherman v. Higgins*, 7 Mont. 479; *Raymond v. Thexton*, 7 Mont. 299; *Barger v. Halford*, 10 Mont. 57.) Furthermore, the appellant, in presenting his statement for a settlement, was admonished by the district court judge as to its condition; for the judge settled the statement in the following language: "The foregoing statement on motion for new trial is correct, and is signed, settled, and allowed this twenty-ninth day of July, 1892, without approval of form. John J. McHatton, Judge." We feel that we must abide by these decisions, and in accordance therewith, disregard the evidence. This removes from consideration appellant's contention that the verdict is not supported by the evidence. It also removes from consideration the objections to the instructions, because, without reviewing the

evidence, we are not informed what application the instructions had thereto.

There are some other specifications of error, in regard to which, perhaps, the record is sufficient to present them for our consideration. One is as follows: The plaintiff offered a bill of sale from Brennan and Company to plaintiff. The defendant objected to the bill of sale that it was not evidence of the purchase or sale of the property, or of the delivery and sale of the property. It may have been that the bill of sale alone did not fully prove the sale and delivery of the personal property; but it certainly cannot be contended that the written bill of sale, executed by the parties, was not properly a part of the evidence of the sale, tending, as far as it went, to prove the sale.

There are some other points raised in the specifications, which we have examined, and which have even less merit than this one just noticed, and which it does not seem necessary to treat. There is also an appeal from the judgment, but the appellant has not suggested any infirmities in the judgment, apparent upon the judgment-roll, and we have not been able to discover any reason why the pleadings do not sustain the judgment. Let the judgment and order denying new trial be affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

FALK, APPELLANT, v. BROWN, RESPONDENT.

[Argued January 14, 1893. Decided March 13, 1893.]

NEW TRIAL—Sufficiency of evidence—Abuse of discretion. —It is an abuse of discretion for the trial court to set aside a verdict for plaintiff and grant a new trial for insufficiency of evidence in a suit to recover a balance of an account, where it appeared that the account had been running over a year during which time numerous payments were made; that defendant was a sole trader and that the goods were delivered to and consumed by her employees at her places of business, which facts were not disputed, except that the payments were by her husband who appeared from the evidence to be acting as her agent.

Appeal from Third Judicial District, Deer Lodge County.

Action on an account. Plaintiff had judgment below. Defendant's motion for a new trial was granted by DURFEE, J. Reversed.

H. P. Whitehill, for Appellant.

Edward Scharnikow, for Respondent.

PEMBERTON. C. J.—This suit was commenced in a justice's court to recover a balance on an account alleged to be due and owing from respondent, who was defendant below, to appellant, who was plaintiff below. The appellant recovered judgment in the justice's court. The respondent appealed to the district court, where the case was tried *de novo*, with a jury, and a verdict rendered in favor of appellant for the full amount sued for. The respondent moved for a new trial. This motion was sustained by the court below, and from the order granting the new trial this appeal is prosecuted.

The appellant is engaged in the butcher business. The account sued on commenced on the fourth day of May, 1889, and continued to run until July, 1890, amounting to the total sum of \$488.33, on which numerous payments were made during that time, amounting in the aggregate to \$433. From the evidence it appears that the respondent, during all this time, was a sole trader, engaged in mining, ranching, stock-raising, etc. It also appears from the evidence that the meat sued for was delivered to her teamsters and servants, and was taken to her place or places of business, where it was consumed. The delivery of the meat to her employees, and its consumption by those in her employ, is not disputed, either in her answer or evidence. Nor are the numerous payments on said account disputed, except that it is shown that her husband made the payments, who appeared, from the evidence of the case, to be acting as her agent. The respondent set up in her answer a counterclaim, in support of which proof was offered. It seems that the juries in both the justice's and district court disregarded her counterclaim and rendered their verdict for the full amount of plaintiff's claim. The principal ground relied upon to sustain the motion for a new trial is the alleged insufficiency of the evidence to support the verdict. We are of opinion that the evidence is amply sufficient to support the verdict. From an inspection of the record, and fully considering the evidence, and all the circumstances of the case, we are driven to the conclusion that

the court below, in sustaining the motion for a new trial, did not exercise that sound discretion which ought to govern trial courts in such cases. It seems rather to have been an abuse of such discretion. The order of the court below, granting a new trial, is reversed and set aside.

Reversed.

HARWOOD, J., and DE WITT, J., concur.

CHOATE, APPELLANT, v. SPENCER ET AL., RESPONDENTS.

[Argued January 25, 1898. Decided March 20, 1898.]

13	127
20	558
13	127
26	328
18	127
29	99
29	108

SUMMONS—Absence of seal.—A district court summons is void if issued without the seal of the court, where the statute provides that it "must be issued under the seal of the court," and no jurisdiction of the defendant is acquired by the service thereof.

13	127
36	262

JUDGMENTS—Validity.—A judgment entered upon a default, after service of a summons issued without the seal of the court, is void, as well as the execution and all other proceedings thereunder.

DECISIONS OF UNITED STATES SUPREME COURT—When controlling.—A decision of the supreme court of the United States upon a statute which is the same in effect as a Montana statute is controlling upon the supreme court of this state in passing upon the latter statute, where such decision was rendered, and the acts complained of occurred, while the state was one of the territories of the United States.

JUDGMENTS—Section 119 of the Code of Civil Procedure construed.—The provision of section 119 of the Code of Civil Procedure, that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect, does not apply to an action where jurisdiction has not been properly acquired.

Appeal from Sixth Judicial District, Meagher County.

Action to annul sheriff's deed. Defendants' demurrer to the complaint was sustained by HENRY, J. Reversed.

Thompson & Maddox, for Appellant.

The judgment rendered against appellant in the case of *Sullivan v. Choate*, was a nullity, because the seal of the district court was not affixed to the summons. Sections 527, 528, and 68 of the Code of Civil Procedure provide in substance respectively that the district court shall have a seal, that the clerk shall keep the seal and that the summons must be issued under

the seal of the court. By the ancient common law, all process emanating from courts of record was authenticated by the seal of the court. That one thing gave character to the document. Without it the writ was void. This doctrine was always rigidly maintained under the common law, both of England and in the several states of the union, except that in many of the states the practice, as well as the character and functions of seals, has been modified and changed. In English common law there is: *Anonymous*, 1 P. Wms. 523; *Martin v. Kerridge*, 3 P. Wms. 240. In 1868 this subject was carefully considered in the supreme court of the United States in the case of *Aetna Ins. Co. v. Hallock*, 6 Wall. 556, and it was there held that process without the seal of the court conferred no jurisdiction or authority as against defendants. Appellant respectfully submits that this decision of the United States Supreme Court is controlling upon this court in the determination of this question, and relies upon the authority and reasoning of *Sullivan v. City of Helena*, 10 Mont. 143, 144. The court rendering the judgment in *Sullivan v. Choate*, being a territorial court, acting under power conferred by Congress, the validity of the judgment in that case, as presented by the complaint herein, is a federal question, over which the supreme court of the United States would have jurisdiction. (*Steines v. Franklin Co.* 14 Wall. 15; *York v. Texas*, 137 U. S. 15; *Pennoyer v. Neff*, 95 U. S. 714; *Delmas v. Merchants' Bank*, 14 Wall. 661.) The following cases sustain appellant's position that the summons in *Sullivan v. Choate* was void in that it was issued without the seal of the district court. (*Hall v. Jones*, 9 Pick. 446; *Ex parte Smith*, 15 Pick. 446; *Witherel v. Randall*, 30 Me. 168; *Bybee v. Ashby*, 2 Gilm. 151; 43 Am. Dec. 47; *Tibbetts v. Shaw*, 19 Me. 204; *Boal v. King*, 6 Ohio, 11; *State v. Flemming*, 66 Me. 142; 22 Am. Rep. 552; *Bailey v. Smith*, 12 Me. 196; *Porter v. Haskell*, 11 Me. 177; *Commonwealth v. Stockbridge*, 11 Mass. 279; *Woolford v. Dugan*, 2 Ark. 131; 35 Am. Dec. 52.) The absence of the seal was not an amendable defect. (*Bailey v. Smith*, 12 Me. 196; *Tibbetts v. Shaw*, 19 Me. 204; *Witherel v. Randall*, 30 Me. 168.) Observing the seal on the summons — the highest evidence of the court from which it emanated — and that it was the seal of the probate court, appellant had the

right to disregard it altogether; and the subsequent rendering of judgment against him was simply void and of no effect, as also were all subsequent proceedings.

F. N. & S. H. McIntire, for Respondents.

1. The principal point made in this case is that the summons issued out of the district court in and for Chouteau county did not bear upon it the impress of the seal of said court, as required by the Compiled Statutes. (Div. 1, § 68.) The plaintiff contended that the omission of the seal of the court rendered the summons and all subsequent proceedings void, and no jurisdiction of the person of George R. Choate, the defendant in the case of *Sullivan v. Choate*, was ever acquired by said district court of Chouteau county. In support of his position in this court, the appellant's counsel cite a number of early cases from Maine, Massachusetts, Ohio, and Illinois, and one from the supreme court of the United States. The later decisions and the weight of recent authorities hold that the omission of the seal from, or the putting of the wrong seal upon, process is a defect of form merely, and not of substance, does not render the process void, and the process is amendable at any stage of the proceedings, even after judgment and sale upon execution. (*Jump v. Batton's Creditors*, 35 Mo. 193; 86 Am. Dec. 146; *Parsons v. Swett*, 32 N. H. 87; 64 Am. Dec. 352; *Murdough v. McPherrin*, 49 Iowa, 479; *Talcott v. Rosenberg*, 8 Abb. Pr. N. S. 287; *Dever v. Akin*, 40 Ga. 429; *Corwith v. State Bank*, 18 Wis. 560; 86 Am. Dec. 793; *Sabin v. Austin*, 19 Wis. 421; *People v. Dunning*, 1 Wend. 16; *Dominick v. Eaker*, 3 Barb. 17; *Arnold v. Nye*, 23 Mich. 286; *Bridewell v. Mooney*, 25 Ark. 524; *Hunter v. Burnsville Turnpike Co.* 56 Ind. 213; *Purcell v. McFarland*, 1 Ired. 34; 35 Am. Dec. 734; *Rose v. Ingram*, 98 Ind. 276; *Boyd v. Fitch*, 71 Ind. 306; *State v. Davis*, 73 Ind. 359; *Taylor v. Courtney*, 15 Neb. 190; *Warmoth v. Dryden*, 125 Ind. 355; *Logan v. Hillegass*, 16 Cal. 202; *Freeman on Executions*, § 46.)

2. Decisions holding the contrary will be found, upon careful scrutiny, to have been based upon the strict rules of the common law, as was *Aetna Ins. Co. v. Hallock*, 6 Wall. 556, cited by appellant's counsel; but in all the code states that

have provisions like ours (Comp. Stats. Div. 1, §§ 116, 119) the decisions are uniform to the effect that defects or irregularities of form only in process not affecting the substantial rights of the parties, such as the omission of the seal, shall be disregarded, and such process held valid. The case of *Etna Ins. Co. v. Hallock*, 6 Wall. 556, is not an authority worthy of being followed by this court. That case was appealed from the supreme court of Indiana, before the adoption by that state of the Code of Civil Procedure, and was decided by the supreme court of the United States upon common-law principles. In the subsequent case of *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213, and the other Indiana cases above cited on the same point, the supreme court of that state refused to follow the decision in *Etna Ins. Co. v. Hallock*, and adopted the generally accepted rules laid down in the codes.

3. The summons being perfect in other respects, put the defendant upon notice—the only province of a summons—and he being within the jurisdiction, it was sufficient for that purpose. Choate's objections to the form of the summons should have been taken advantage of by motion to quash. After judgment and an opportunity to appear and question the jurisdiction of the court had upon such process, objections to form, merely, come too late. (*Brewer v. Sibley*, 13 Met. 175; *Foot v. Knowles*, 4 Met. 386.)

4. The court has control of its process, and may order the summons to be amended at any time. (*Pollock v. Hunt*, 2 Cal. 194; *Pierse v. Miles*, 5 Mont. 549.) And the allegation of the amended complaint that the seal was fraudulently altered on the summons is insufficient, in not stating by whom it was altered; for the clerk of the court being the lawful custodian of its seal and records, the law will presume that he placed the seal upon the summons in the course of his official duties.

PEMBERTON, C. J.—This is a suit to quiet title to certain mining property, situated in Meagher county, and described in the complaint. The appellant, who was plaintiff below, alleges in his complaint that on the sixteenth day of July, 1888, he was, and is now, seised and possessed of an estate of inheritance in and to the mining claim described therein; that the respond-

ents, who were defendants below, are tenants in common with him in and to said property, but dispute appellant's title to the same; that on the seventeenth day of July, 1888, the appellant was indebted to one Jere Sullivan in the sum of \$208.32; that on said last-mentioned day the said Sullivan commenced suit against him to recover judgment for such indebtedness in the district court of the then fourth judicial district of the territory of Montana, in and for Choteau county, and that on said last-mentioned day the said Sullivan procured to be issued, under the hand of the clerk of said court, a certain paper, purporting to require this appellant to appear and answer said complaint; that said paper or pretended summons did not contain or bear in any place or part thereof the seal of said district court, but, on the contrary, bore the impression of the seal of the probate court of said Choteau county; that on the twenty-first day of July, 1888, there was served upon the appellant a copy of said pretended summons in Meagher county, in the territory of Montana, without the seal of said district court; that no summons issued out of said district court, and authenticated by the seal of said court, was ever served on the appellant; that appellant never appeared in said court at any time to answer said complaint; that said pretended summons, so served upon the appellant, was returned and filed with the clerk of said court on the twenty-fifth day of July, 1888; that thereafter, on the fifth day of November, 1888, the default of the appellant was entered in said court, and final judgment entered in said court against the appellant in said cause; that said pretended summons was the only means by which said court ever attempted to acquire jurisdiction of said appellant; and, as such, was the only basis for the judgment entered in said court against appellant in said cause; that on the fourth day of June, 1889, an execution issued out of the district court upon said pretended judgment, directed to the sheriff of Meagher county, who levied the same on the property of the appellant (described in the complaint herein) and on the fifth day of July, 1889, said sheriff sold said property to satisfy said pretended execution; that Timothy E. Collins *et al.* purchased said property at said pretended sale; that thereafter said Collins and others transferred their certificate of purchase of said property to the respondents, and that

on the thirteenth day of January, 1890, the said sheriff executed and delivered a sheriff's deed to said property to the respondents, which deed was duly recorded in the office of the recorder of said county of Meagher; that said property was sold for the sum of \$722.86, but was of a much greater value, to wit, of the value of \$30,000; that said respondents, at the time of receiving the certificate of purchase and the deed to said property, were well acquainted with the defects and infirmities of the said pretended summons and judgment issued and rendered in said district court upon and against the appellant, and purchased the same with full knowledge of all the defects in relation thereto; that said respondents claim title in fee to the mining ground mentioned in the complaint, under and by virtue of said certificate of purchase and sheriff's deed thereto; and that said deed is a cloud upon the title of appellant, to the injury and damage of appellant in the free use and employment thereof. Appellant asks that said deed be declared void, and that it be canceled. To this complaint the respondents filed a general demurrer, which was sustained by the court, and judgment was rendered for the respondents for costs. From this judgment the appellant prosecutes this appeal.

The appellant insists that the summons issued out of the district court of the fourth judicial district of the territory of Montana, in and for Choteau county on the seventeenth day of June, 1888, in the suit of Jere Sullivan against this appellant, was absolutely void, because it was not authenticated by the seal of said court. If this contention is correct, the district court never acquired jurisdiction of this appellant, who was defendant in that suit, by the issuance and service of such summons; and any judgment said court may have entered in said cause, as well as the execution issued for the enforcement of such judgment, and all other proceedings thereunder, including the levy thereof on the property of appellant, and the sale and execution and delivery of the sheriff's deed complained of, would necessarily be null and void. The complaint states that the said summons bore the impress of the seal of the probate court of Choteau county, instead of the seal of the district court, at the time of its issuance and service. For the purposes

of this cause we shall treat the summons as having been issued without a seal.

At common law, a writ issuing from a court having a seal, in order to be considered authentic or of any value, must be attested by the seal of the court from which it is issued. The laws of this state provide that the district courts shall have a seal (Code Civ. Proc., § 527), and that the clerk of the court shall keep the seal (Code Civ. Proc., § 528). And section 68 of the Code of Civil Procedure requires that the summons must be issued under the seal of the court. So that, under our statutes, there is no departure from the common-law rule requiring such writs to be authenticated by the seal of the court from which they issue. The appellant has cited a number of authorities holding the common-law doctrine that such writs must be authenticated by the seal of the court from which they are issued in order to give them validity, and without which they would be void. The principal case relied upon by appellant in support of his contention that the summons under discussion was void for want of the seal of the court is *Insurance Co. v. Hallock*, 6 Wall. 556. This case went to the supreme court of the United States, from Indiana, and involved the validity of a deed executed and delivered by a sheriff to real estate, under an order of sale, under a statute of that state. The statute required the order of sale to be issued under the seal of the court. The seal was omitted from the order of sale. In delivering the opinion of the court, Mr. Justice Miller says: "If the paper here called an 'order of sale' is to be treated as a writ of execution or *fieri facias* issued to the sheriff or as a process of any kind issued from the court, which the law required to be issued under the seal of the court, there can be no question that it was void, and conferred no authority upon the officer to sell the land. The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one. We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ. We have held that a bill of exceptions must be under the seal

of the judge." This was a collateral attack made upon the deed executed by the sheriff, under the order of sale from which the seal had been omitted. Counsel for the respondents contend that the case just cited is not controlling, and claim that the Indiana courts have declined to follow the rule therein asserted, and cite a number of Indiana cases in support of their position. From an examination of the Indiana cases cited by respondents, we are of opinion that the departure from the rule asserted in *Insurance Co. v. Hallock*, 6 Wall. 556, has been occasioned by the legislation in Indiana since the decision in 6 Wall. 556. In support of this view, we quote from *State v. Davis*, 73 Ind. 360, this case being cited by respondents. In this case the court say: "It is undoubtedly true, as appellees insist, that at common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued. (*Williams v. Vanmeter*, 19 Ill. 293; *State v. Flemming*, 66 Me. 142; 22 Am. Rep. 552; *Wheaton v. Thompson*, 20 Minn. 196; *Reeder v. Murray*, 3 Ark. 450.) The case of *Insurance Co. v. Hallock*, 6 Wall. 556, does decide that an order of sale issued by a court of this state was void because not attested by the seal of the court. It has also been held by this court that, where there is no statute to the contrary, a writ or record must be attested by the seal of the court from which it comes. (*Jones v. Frost*, 42 Ind. 543; *Hinton v. Brown*, 1 Blackf. 429; *Sanford v. Sinton*, 34 Ind. 539.) The older cases did hold that a writ lacking the seal of the court was absolutely void, but there is much conflict upon this point among the modern cases, many of them holding that such a writ is not void, but merely voidable. Our court long since held that such a writ was not void. It is true, as argued by appellees, that a summons so clearly defective as to be insufficient to confer jurisdiction cannot, after judgment, be so amended as to give jurisdiction. If a summons without a seal be conceded to be void, then there can be no amendment, for it is axiomatic that a void thing cannot be amended. The liberal provisions of our statute respecting the summons would take such writs from under the old common-law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the code upon this subject are

contained in article IV., and the provision which directly bears upon this point is found in section 37, and is as follows: ‘No summons or the service shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him in court.’” It must appear as conclusive that the court in this case would have held the summons void but for the statute of Indiana, quoted in their opinion. This case seems to us to be strong authority for holding that, but for the statute of Indiana in relation to the essentials of a summons, that court would have held to the doctrine contained in 6 Wall. 556, to wit, that such writs, without the seal of the court from which they issued, are void.

Counsel for the respondents have cited many authorities to the effect that defective process cannot be attacked in a collateral proceeding, and to the effect that defective process is amendable in many states. But this is not a collateral proceeding. It is a direct proceeding to have a deed canceled, which is not void on its face, but which is alleged to be void because of its being the result of a judgment void for want of jurisdiction of the court rendering it, and which deed is a cloud upon the title of the party seeking relief. (See 3 Pomeroy's Equity Jurisprudence, § 1395 et seq.)

The appellant further contends that, at the time of the issuance and service of the summons under discussion, Montana was one of the Territories of the United States, and for this reason the opinion of the supreme court of the United States in 6 Wall. 556, is decisive of the question as to the validity of said summons, and controlling upon this court in the determination of this question; and relies upon the authority and reasoning in *Sullivan v. City of Helena*, 10 Mont. 134. We are of opinion that this position is unassailable, our statute being, in effect, the same as that of Indiana at the time of the rendition of the opinion in 6 Wall. 556. This reasoning and holding do not in our opinion, contravene section 119 of our Code of Civil Procedure, which provides that “the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by rea-

son of such error or defect." This section presupposes an action pending, of which the court has acquired proper jurisdiction, and we are not passing upon the powers of the court under such circumstances. We hold in the case at bar that the summons—the jurisdictional writ—under the law and decisions in force and controlling in this jurisdiction at the time of its issuance was void, because not issued under the seal of the court. If this case involved a defective process, issued subsequent to summons, and the acquiring of jurisdiction by the court thereunder, then the contention of respondents that such defect or irregularity could be amended or disregarded might be urged with great force. Judgment reversed, and cause remanded, with directions to overrule the demurrer.

Reversed.

HARWOOD, J., and DE WITT, J., concur.

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STATE EX REL. JAY, RESPONDENT, v. MARSHALL ET AL., APPELLANTS.

[Argued February 9, 1893. Decided March 27, 1893.]

SCHOOLS—*Authority of trustees to remove.*—The term "schoolhouse," as used in section 1885, fifth division of the Compiled Statutes, empowering school trustees to remove schoolhouses when the trustees may be directed by a vote of the district so to do, does not mean simply the house, but refers rather to the school plant, including the general equipment, pupils and teacher, and therefore a board of trustees has no authority to remove the school properties and equipment from the established schoolhouse to a house in another part of the district without being directed so to do by a vote of the district.

SAME—*Mandamus to compel trustees to restore school to regular schoolhouse.*—An application for a writ of mandamus to compel a board of school trustees to restore a school to the old schoolhouse, from which such board had removed it without authority, should have been denied where it appeared that after the relator had demurred to the appellants' answer the court continued the hearing, and ordered a school election to determine the question whether the action of the board in removing the school should be ratified, which resulted in the approval of the action of the board, which facts were presented to the court in a supplemental answer, although the court may not have had authority to order the election.

Appeal from Fifth Judicial District, Madison County.

Application for mandamus to compel school trustees to restore a school to the regular schoolhouse. Writ was granted by GALBRAITH, J. Reversed.

Statement of facts prepared by the judge delivering the opinion.

This is an appeal from the judgment of the district court in a special proceeding, in which the relief granted was a peremptory writ of *mandamus*. The defendants are trustees of school district No. 23 of Madison county, Montana. The relator is a resident and taxpayer of said school district. In his application for the writ, he sets up that there is a regularly built and established schoolhouse, and that the trustees unlawfully moved the school properties and equipment to a house in another and remote part of the district, and ordered the teacher to go to said place and hold the school; that they are maintaining, and will continue to maintain, the school at said other place. The relator asks for the writ of *mandamus* to require the trustees to restore the school to the old schoolhouse. The answer of respondents is a very voluminous document, and sets up in great detail the alleged worthless and dangerous character of the old schoolhouse, and the inconvenience of its location for the people of the district. It admits the moving of the school to the new place, and describes the convenience and suitability of the new schoolhouse and site. It alleges that for three years prior to the application for the writ of *mandamus* the school had been maintained at the new place, and so maintained with the acquiescence of the people of the district. The answer admits that the new schoolhouse has been erected and used for a school without there being submitted to the qualified electors of the district the question of the removal of the school. The section of the statute requiring such submission is as follows: "Every board of trustees . . . shall have power, and it shall be their duty, . . . Sixth. To build or remove schoolhouses, and purchase or sell school lots, when the trustees may be directed by a vote of the district so to do." (Comp. Stats., div. 5, § 1885.) The relator demurred to the answer, in that it did not constitute a defense; that is to say, that it did not show a reason why the *mandamus* should not be issued. The point of the demurrer was that the moving of the school by the trustees was without authority, because they had not submitted the question

to the electors, as provided in section 1885, subdivision 6, of the fifth division of the Compiled Statutes, and that as the trustees did not show by their answer that they had the vote of the district upon the question, they therefore did not show any reason why they should not be required by *mandamus* to restore the school to the old site and house theretofore established. Upon the hearing of the demurrer, on May 28th, in the district court, the judge said that he was inclined to believe that the demurrer must be sustained, but that he would not so decide at the present time. He then continued the hearing until July 25th, and he made an order that an election should be held on the fifteenth day of July; that the election be by ballot; that notices be posted, and that it be held under the school law providing for elections. The order of the court was that the question to be voted upon at said election should be:

"Shall the action of the board of trustees of district No. 23 in said county of Madison, in building a new schoolhouse and removing the school furniture and appliances thereto, be approved and ratified? And at such election the ballot used shall contain the words, to wit:

"'Approval and ratification: Yes'; or,

"'Approval and ratification: No.'"

Thereafter, on the twenty-fifth day of June, the trustees duly posted notices of election. In pursuance to said notice said election was held. The trustees returned their proceedings into court, and filed an amended and supplemental answer, setting up the holding of the election and the result thereof. The election showed a majority of the votes in favor of the ratification of the act of the trustees. The relator demurred to the amended and supplemental answer, and moved to strike out therefrom the matter in regard to the election and election returns. The motion to strike out and the demurrer were sustained. The judge of the court filed a short opinion in sustaining the demurrer and motion. The ground of his action was apparently that, notwithstanding the election which had been held, such election constituted no defense to the writ. He consequently issued the writ. From the judgment issuing the same this appeal is taken.

Luce & Luce, for Appellants.

W. A. Clark, for Respondent.

DE WITT, J.—When the statute provides that the school trustees shall have power to remove "schoolhouses" only when directed by a vote of the district so to do, we are of opinion that the term "schoolhouse" does not mean simply the house, but refers rather to the school plant, including the general equipment, furniture, maps, charts, globes, and pupils and teacher. The rural school districts are large geographically, and small in population. The school should naturally be located to best serve the greatest number. Its location can in no way be so satisfactorily determined as by a vote of the electors of the district. Such determination is in accordance with the American principle of majority rule. We take it that it rarely, if ever, occurs that a schoolhouse is moved. In cities the schoolhouses are elaborate structures, the moving of which is wholly impracticable. In the country they are rude buildings, and are likely to be not worth the moving. We doubt that a schoolhouse, as a building, was ever moved in this state. We can scarcely conceive of circumstances where it would be practicable to move the house. On the other hand, changes in the centers of population frequently occur in rapidly developing communities. When they occur, the trustees are likely to be elected from such new center. The people of such new center are likely to want the school near to them. But the trustees must not change the place of the school without the vote of the district. At such election all elements express themselves. Matters of convenience to the majority, questions of expense to the district, suitability of site, and scores of opinions and influences which sway a rural school district, are sifted down through the ballots, and the result demonstrates the will of the people as to the site of their school. This, in our opinion, was within the view of the legislature, and they meant to express their intent (section 1885, subd. 6) that the people should determine the site of their school. This is a more reasonable view than to hold that the statute means to say only that a vote shall be had upon the question of moving the house. The house is the shell—the envelope. The substance is the school itself, and it is that,

in our opinion, which the statute contemplates. The district court judge was able to observe from the pleadings that the trustees had moved the school without being directed so to do by a vote of the district. He apparently held the view that we have suggested as to the interpretation of section 1885, subdivision 6, and was of opinion that such act of the trustees was without authority, and that the demurrer to the answer ought to be sustained; but he was able to observe, further, that the school had been moved for three years before the commencement of the *mandamus* proceeding, and had been maintained at the new place for that time, with the acquiescence of all the people, and with complaint from none. He said that he thought the demurrer to the answer should be sustained, but he may have seen the hardship of disturbing the then and for three years existing condition of affairs until the will of the people was announced as to the site of the school. He therefore ordered an election to be held. We are not prepared to say that the court had authority to make this as an order. We may regard it as a suggestion by the court, acquiesced in by the parties. The court had authority to continue the hearing of the case, and the school trustees had authority to hold the election. During the continuance the trustees did hold the election.

At the next hearing of the case in the court the trustees exhibited the election returns, and the result thereof, in a supplemental answer. They presented them as a reason why the *mandamus* should not issue. In form, this election was an approval and ratification of the act of the trustees in moving the school to the new place. In this matter of form the election was not wholly regular; but we think that it may be reasonably held that the result obtained was an expression of the will of the people that the school should be at the new place. It is the same result that would have been reached if the court had, by *mandamus*, required the trustees to move the school back to the old place, and then an election had been held, and it was decided to move to the new site. By regarding the election which was held as practically an election authorizing the trustees to move the school there is saved the twice moving of the school. We are of opinion that this view

should obtain. The district court, therefore, on the final hearing, had before it this situation: That the trustees had moved the school, and that they had been directed by a vote of the district so to do. The order of these events had been reversed from that doubtless contemplated by the statute; but, by overlooking this irregularity, substantial justice is done, and the will of the people of the district is effected as completely as if the *mandamus* had sent the school back to the old place, and an election, wholly formal, had again sent it over to the new site. We are of opinion that the situation, as presented to the district court upon the final hearing, should have remained undisturbed. "*Interest reipublicæ ut sit finis litium.*" And particularly it interests a small school district that its substance should not be consumed in unnecessary litigation. The district court judge must have inclined to these views when he ordered the election, but, upon the final hearing, he evidently considered the election as of no force, for he ordered the writ issued. We are of opinion that the court had better have refrained from interference. Let the judgment therefore be reversed. The case is remanded to the district court, with directions to dismiss the writ, and enter judgment in favor of the appellants for costs.

Reversed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*concurring*).—The real question for determination in this case is whether the supplemental answer of appellants sets forth facts sufficient to constitute a defense to this proceeding for mandamus to compel said trustees to remove the school from its present location back to the schoolhouse formerly occupied; for, if the facts alleged in the supplemental answer constitute a defense, the demurrer thereto admits the truth of those allegations, leaving simply a question of law for determination (section 575, Code Civ. Proc.), and judgment should be entered accordingly. The first change of place of the schoolhouse for said school district, without submission of that question to the electors of the district, as provided in the sixth subdivision, section 1885, of the fifth division of the Compiled Statutes, was irregular, and appears to have been so regarded by the

in our opinion, which the statute contemplates. The district court judge was able to observe from the pleadings that the trustees had moved the school without being directed so to do by a vote of the district. He apparently held the view that we have suggested as to the interpretation of section 1885, subdivision 6, and was of opinion that such act of the trustees was without authority, and that the demurrer to the answer ought to be sustained; but he was able to observe, further, that the school had been moved for three years before the commencement of the *mandamus* proceeding, and had been maintained at the new place for that time, with the acquiescence of all the people, and with complaint from none. He said that he thought the demurrer to the answer should be sustained, but he may have seen the hardship of disturbing the then and for three years existing condition of affairs until the will of the people was announced as to the site of the school. He therefore ordered an election to be held. We are not prepared to say that the court had authority to make this as an order. We may regard it as a suggestion by the court, acquiesced in by the parties. The court had authority to continue the hearing of the case, and the school trustees had authority to hold the election. During the continuance the trustees did hold the election.

At the next hearing of the case in the court the trustees exhibited the election returns, and the result thereof, in a supplemental answer. They presented them as a reason why the *mandamus* should not issue. In form, this election was an approval and ratification of the act of the trustees in moving the school to the new place. In this matter of form the election was not wholly regular; but we think that it may be reasonably held that the result obtained was an expression of the will of the people that the school should be at the new place. It is the same result that would have been reached if the court had, by *mandamus*, required the trustees to move the school back to the old place, and then an election had been held, and it was decided to move to the new site. By regarding the election which was held as practically an election authorizing the trustees to move the school there is saved the twice moving of the school. We are of opinion that this view

should obtain. The district court, therefore, on the final hearing, had before it this situation: That the trustees had moved the school, and that they had been directed by a vote of the district so to do. The order of these events had been reversed from that doubtless contemplated by the statute; but, by overlooking this irregularity, substantial justice is done, and the will of the people of the district is effected as completely as if the *mandamus* had sent the school back to the old place, and an election, wholly formal, had again sent it over to the new site. We are of opinion that the situation, as presented to the district court upon the final hearing, should have remained undisturbed. "*Interest reipublicæ ut sit finis litium.*" And particularly it interests a small school district that its substance should not be consumed in unnecessary litigation. The district court judge must have inclined to these views when he ordered the election, but, upon the final hearing, he evidently considered the election as of no force, for he ordered the writ issued. We are of opinion that the court had better have refrained from interference. Let the judgment therefore be reversed. The case is remanded to the district court, with directions to dismiss the writ, and enter judgment in favor of the appellants for costs.

Reversed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*concurring*).—The real question for determination in this case is whether the supplemental answer of appellants sets forth facts sufficient to constitute a defense to this proceeding for mandamus to compel said trustees to remove the school from its present location back to the schoolhouse formerly occupied; for, if the facts alleged in the supplemental answer constitute a defense, the demurrer thereto admits the truth of those allegations, leaving simply a question of law for determination (section 575, Code Civ. Proc.), and judgment should be entered accordingly. The first change of place of the schoolhouse for said school district, without submission of that question to the electors of the district, as provided in the sixth subdivision, section 1885, of the fifth division of the Compiled Statutes, was irregular, and appears to have been so regarded by the

trial court. But that removal occurred about three years before the commencement of this proceeding, and I gravely doubt that, after such removal and establishment of said school at the latter place had been acquiesced in for such a period of time, a *mandamus* proceeding should have been entertained to compel the present board of trustees to again remove said school back to the former site, or elsewhere, without first submitting to the electors of said district the question of such removal, as provided in the section of the statute cited *supra*.

Under such a state of facts, I doubt that it could be maintained that the law enjoins upon the present board of trustees the duty of removing said school back to the former site, and to a schoolhouse abandoned three years since, without submitting the question of removal to the proper electors. If the present board of trustees were not under such duty, then this proceeding will not lie for the purpose sought to be attained. (Code Civ. Proc., § 566.)

The court below, however, in the first stage of the proceedings, was of opinion that the question of the change of the location of said school from its former to its present site should, under the circumstances, be submitted to the electors of said district; and whether the action of the court upon this point be regarded as an order that such election be held, or as a suggestion of the propriety of settling the controversy by such election, to be held under the provisions of the school law, the fact appears by the supplemental answer that such order or suggestion was voluntarily acquiesced in, and such election held pursuant to the provisions of the school law, whereat, as appears, the supporters of each side of the controversy engaged their utmost endeavors to prevail, and the result was a ratification of the former action of the trustees. It is a familiar principle of law that although an agent, in doing an act for the principal, departs from or exceeds his authority, such action may be ratified by the principal. The electors of said district having, by their vote, not only ratified the former moving of said school, but in effect declared their will to be that the school remain where now located, it cures the former irregularity, as far as it can be cured. But, leaving the question of ratification

aside, said election, in effect, as a new proposition, to all intents and purposes, involved the question whether said school should remain at its present location or be removed back to its former site, which question was resolved in favor of the present location. I am unable to conceive how it can be successfully affirmed, in the face of this authoritative declaration by the electors of said district, that said school must still be carried back to the former location, simply because of an irregularity committed by a board of trustees in removing said school to its present site three years ago. Giving to that irregularity all the force it could have, it does not destroy the right of the electors of said district to now determine where said school shall be located; and that determination has been announced in favor of the present location, as appears by the supplemental answer. I therefore, upon these grounds alone, concur, without hesitation, in the conclusions that the supplemental answer, which is confessed as true by the demurrer, shows a sufficient defense to the proceeding; and that judgment of dismissal, with costs, in favor of appellants, should be entered in the court below.

McINTOSH, RESPONDENT, v. PERKINS ET AL., APPELANTS.

[Argued January 6, 1893. Decided March 30, 1893.]

PARTNERSHIP—*In respect to mining property—How created as between the parties.*
Where conveyances were made by the plaintiff, who was the owner of mining property, of an undivided two-thirds interest therein to defendant, who, in consideration thereof, agreed to cause such development work to be done as to put the property into a marketable condition and to use his best endeavors to sell the property at the highest price obtainable, bearing all expense of development and of negotiating a sale, and to pay the plaintiff one-third of the gross proceeds upon making a sale, a partnership relation is created between the plaintiff and defendant in respect to the property which is the subject of the enterprise.

SAME—*Action for accounting—When properly brought.*—An action in equity by one of such partners against the other for an accounting is proper where the plaintiff had done the development work under employment by the defendant, who, having sold the property after obtaining plaintiff's remaining one-third for that purpose, refused upon demand to pay over to the plaintiff his share of the proceeds of the sale and the reasonable value of the development work.

SAME—*Injunction in action for accounting—Receiver.*—The granting of an injunction in such case restraining the bank, in which were deposited the proceeds

of the sale of the property, from paying it over to the defendant and restraining the vendee from paying to the defendant a balance owing on the purchase price of the property is irregular, for if the facts warranted the placing of the partnership funds *in custodia legis* it should have been accomplished through the appointment of a receiver.

SAME—Accounting—Pleading—Receiver.—A proper case for the appointment of a receiver is not shown where it appeared from the complaint that all the joint operations in respect to the partnership property had been consummated except the collection of the balance of the price for which it had been sold, and there remained simply a dispute between plaintiff and defendant as to the proper apportionment of the fund arising from the sale of the property, there being no averment that the defendant was insolvent or that the partnership fund was in danger of being lost, squandered, or removed from the jurisdiction.

Appeal from Fifth Judicial District, Beaverhead County.

Action for an accounting and injunction. Defendant's motion to dissolve the injunction was refused by GALBRAITH, J. Modified.

Statement of facts prepared by the judge delivering the opinion.

This appeal is from an order refusing to dissolve an injunction. The complaint sets forth that plaintiff, being the owner of several valuable mining claims, bearing gold, silver, and other valuable metals, and water rights, particularly described and situate in Beaverhead county, Montana, for a valuable consideration stated, sold, and conveyed to defendant Perkins an undivided one-third interest therein, and in further consideration of the representations of defendant Perkins, to the effect that he had business relations, knowledge, and experience whereby he could make an advantageous sale of said property, for both plaintiff and said defendant, if the same were further developed by sinking shafts, running tunnels, etc., so as to put said property into a more salable condition; that he, the said defendant Perkins, would, in consideration of the conveyance to him of an additional undivided one-third interest in and to said property, at his own expense, and without any expense to plaintiff, so develop and improve said mining claims, by running tunnels, shafts, levels, and otherwise, as to put the same into marketable condition; and that, after said work was accomplished, defendant Perkins would, at his own expense, and without expense to plaintiff, undertake and use his best endeavors

to sell said property for as large a sum as could be obtained therefor, for the use and benefit of plaintiff and defendant, according to their respective interests therein, on condition that, in case defendant Perkins effected said sale, he should be entitled to retain two-thirds of the price thus obtained for said property as his share of the proceeds derived from such sale, and that he would pay over to plaintiff one-third of the gross sum for which said property was thus sold; that plaintiff, reposing implicit confidence in said defendant Perkins, and believing said representations, and relying upon said promises made by him, and in consideration thereof, accepted said offer, and transferred to defendant Perkins an additional undivided one-third interest in and to said mining property on the conditions proposed by him as aforesaid; that thereafter, upon request, and employment by defendant Perkins, plaintiff performed a large amount of the development work on said property, by running tunnels, drifts, shafts, and levels, greatly enhancing the market value thereof, to wit, work on one of said lode claims, to the reasonable value of \$2,000, and work on another of said lode claims, to the reasonable value of \$500; all of which work defendant Perkins had promised and agreed to do, or cause to be done, entirely at his own expense, and for the consideration aforesaid, and for the doing of which development work defendant Perkins agreed to pay plaintiff; that said defendant has not paid therefor, except certain payments, amounting in the aggregate to about \$500; that by reason of the faith and confidence reposed in defendant Perkins by plaintiff, and of said representations, promises, and agreements on the part of defendant Perkins, and plaintiff's reliance thereon, plaintiff, after conveying said additional one-third of said property to defendant Perkins, as aforesaid, also committed to him the sole and exclusive matter of negotiating a sale of all of said property; that thereafter defendant Perkins represented to plaintiff that he had at last arranged to sell said property for the sum of \$9,000, as the total and highest price he could obtain therefor, after using his best endeavors to that end, that, in order to effect said sale, it was necessary for plaintiff to execute and deliver to defendant Perkins a conveyance of plaintiff's remaining one-third of said property, which con-

veyance was to be held by defendant Perkins for the period of six months, awaiting the consummation of said sale; that relying on and believing all representations made by defendant Perkins aforesaid, and having no other information, or means of information, concerning the truth of said statements, plaintiff made and delivered to defendant Perkins the last-mentioned conveyance of plaintiff's remaining undivided one-third interest in and to said property for the stated consideration of \$3,000; that said sum stated as consideration was not paid, but was to be paid when said sale was consummated; that contrary to the representations aforesaid, as to holding said last-mentioned deed for the period of six months, awaiting said sale, defendant Perkins, immediately after obtaining said deed, caused the same to be recorded in the office of the register of deeds of said county; that thereafter defendant Perkins represented that he had arranged for an extension of time within which to consummate said sale for the further period of six months, to which plaintiff consented; that thereafter said defendant Perkins represented to plaintiff that he, the said defendant, had sold said property for the total sum of \$9,000, and no greater sum; that said representations and statements made by defendant Perkins to plaintiff, to the effect that the whole price for which he had negotiated and bargained to sell said property was only \$9,000, were false; and defendant well knew at the time of asserting the same that such statements and representations were false, and such statements and representations were made for the purpose, and with the design, of deceiving, cheating, and defrauding plaintiff of a large portion of his rightful share of the proceeds about to be obtained, and thereafter obtained, for said property, and to induce plaintiff to convey his remaining undivided one-third interest in and to said property, as aforesaid, for the stated consideration of \$3,000; for, on the contrary, defendant Perkins had, prior to the time of making said false representations and statements to plaintiff, negotiated and bargained to sell said mining property for the total price of \$15,000, to be paid therefor, and did, on the twenty-third day of October, 1891, sell said property for the sum of \$15,000, and received on said purchase price the sum of \$10,500, leaving a balance of \$4,500 still

owing and to be paid on said purchase price by the vendee, according to the conditions of said sale; that as soon as plaintiff received information of the sale of said property by said defendant for the sum of \$15,000 as aforesaid, plaintiff demanded of the said defendant an accounting and payment to plaintiff of his rightful share of the proceeds of said sale, under the conditions and agreements existing between plaintiff and defendant as aforesaid; that defendant then and there denied that said property had been sold for the sum of \$15,000, and refused to account or pay over to plaintiff his rightful share of the proceeds of said sale, according to said agreement between plaintiff and defendant Perkins; and that said defendant has not paid plaintiff his share of said proceeds, or any part thereof, except the sum of \$2,100.

The First National Bank of Dillon, Montana, was made party defendant in the action, and as to it plaintiff alleges that according to his information and belief defendant Perkins had on deposit in said bank to his credit, and subject to his order, a large sum of money derived from the sale of said mining property, to wit, \$5,000 of which plaintiff was entitled to at least the sum of \$3,800. Phillip Miller was also made a defendant in the action. He was alleged to have been the purchaser of said property in said sale arranged by defendant Perkins; and it was further alleged that defendant Miller, as plaintiff was informed and believed, still owed the sum of \$4,500, as part of the purchase price of said property. The relief demanded by plaintiff is that defendant Perkins be compelled to account and pay over to plaintiff the sum of \$2,900, alleged to have been wrongfully and fraudulently withheld and retained by defendant Perkins out of plaintiff's share of the purchase price obtained for said property; and also the sum of \$2,000, the alleged reasonable value of work and labor performed by plaintiff in developing said mining property to put the same into salable condition, under the agreement aforesaid. Plaintiff further asks that defendant Perkins be enjoined and restrained from interfering with, or drawing out of said bank any of the said sum of \$5,000 deposited therein, derived from said sale, until the final determination of this action; that said bank be also enjoined from paying over to defendant

Perkins, or his order, the said fund on deposit therein, as aforesaid, or any part thereof. The relief demanded against defendant Miller was that he be enjoined from paying over to defendant Perkins all or any part of the balance of the purchase price of said property then unpaid; and that defendant Miller be required, when such balance was due, to pay the same into court, to be there held to await the final determination of this action. Upon the institution of the action, the court, upon the application of plaintiff, and his execution and delivery to the clerk of said court the bond required in the sum of \$500, ordered an injunction to issue restraining the several defendants from doing any of the acts sought to be enjoined as aforesaid until the further order of the court in the premises. A motion was afterwards made to dissolve said injunction, which motion was denied; but the court thereupon modified the injunction so as to release certain portions of the fund on deposit in said bank, and also a certain portion of the balance of the purchase price to be paid by defendant Miller, from the effect of said injunction, but ordered the same to stand in force, as to portions of each of said funds, awaiting the final determination of the action. From that order refusing to dissolve said injunction this appeal is prosecuted.

W. S. Barbour, for Appellants.

H. J. Burleigh, for Respondent.

HARWOOD, J.—The grounds upon which appellants contend the injunction should be dissolved are: 1. That the complaint does not state facts sufficient to warrant the granting of an injunction; 2. That the complaint does not show that plaintiff would suffer great or irreparable injury, or that defendant Perkins is insolvent, or is about to dispose of his property for the purpose of defrauding the plaintiff, or that, unless the injunction was granted, plaintiff would be unable to enforce any judgment he might obtain. The facts alleged, we think, show a pooling of interests in the property, on the conditions stated, for the purpose of development and sale for the best price obtainable, and division of the proceeds according to the respective interests of the parties. To that end, and for their mutual

benefits, plaintiff conveyed to defendant Perkins an undivided one-third interest, in order to procure the necessary development of the property by defendant Perkins, and to engage his efforts in negotiating a sale; for which one-third interest defendant Perkins agreed to cause said development, and use his best endeavors to consummate a sale at the highest price obtainable after development, for the mutual advantage of plaintiff and said defendant, under the express agreement that defendant Perkins would bear all expense of development and of negotiating the sale, in consideration of the right to retain two-thirds of the proceeds derived from such sale; and that he would account and pay over to plaintiff one-third of the gross proceeds derived from said sale. These facts, in our opinion, show a partnership relation in respect to the property, and the enterprise of which it was the subject. (Parsons on Partnership, 6.) This is clearly an action wherein plaintiff seeks equitable relief, as contradistinguished from an action at law. He sets up the facts showing a fiduciary relation existing between himself and defendant Perkins respecting said property and transactions. On the face of the deeds whereby plaintiff conveyed certain interests in said mining property to defendant Perkins, it appears from a purely legal view that plaintiff sold and conveyed such interests for a stated consideration received. Plaintiff seeks to go back of this apparent legal phase of the transaction, and show that said interests were in fact conveyed to defendant Perkins in trust—one-third interest to procure the necessary development of said mining property by defendant, and another third last conveyed as a convenience, in effecting the sale and passing title to the vendee, to carry out their mutual undertakings; and that all was done with reference to the prior agreement as to what each should do in respect to said property, and receive out of the proceeds resulting therefrom.

Upon such a state of facts growing out of partnership relations, plaintiff would, on the denial of his rights and refusal of defendant to account and pay over plaintiff's part of the proceeds obtained by such sale according to the joint compact, be entitled to prosecute his action in equity for such an accounting and payment. The court having jurisdiction of the whole

subject would in the same action compel such adjustment of differences arising from one partner having borne more than his share of the common expense, or from one having prosecuted development work for which the other had specially agreed to pay, as would enable the court to do complete justice in the divisions of the partnership funds or property. We do not concur in the proposition urged by appellant's counsel that plaintiff has a plain, speedy, and adequate remedy at law. The question to be determined on this appeal is whether the preliminary proceedings had in this case were warranted by the showing made. Appellants insist that the facts alleged do not warrant the issuance of an injunction. The injunction appears to have been issued to require the defendant bank to hold funds alleged to be in its custody derived from the sale of said property; and also to require defendant Miller to withhold payment to the defendant of the balance owing on the purchase price of said property, and pay the same into court to await the determination of the action. We regard this proceeding as irregular. If the facts set up warranted the court in ordering said joint or partnership fund to be placed *in custodia legis*, that should have been effectuated through the appointment of a receiver. (Code Civ. Proc., § 229.)

The court did not get custody of said fund alleged to be in the bank by enjoining the detention thereof by the bank; for the bank may have been detaining said fund on other grounds or claims. Nor would the injunction requiring defendant Miller to withhold from defendant Perkins said balance owing on said contract of sale, and that the balance be paid into court, be a proper proceeding to accomplish the object aimed at by the court, unless the order for payment was voluntarily complied with; for Miller might be delinquent in payment, or claim some defense thereto; and in either event other proceedings would be necessary to accomplish the object sought by the court. A receiver would be in a position, and possesses power under the direction of the court, to invoke remedies for such difficulties. (Code Civ. Proc., § 233.) Again, the procedure of enjoining the retention of funds in the possession of a party simply in custody thereof, until the determination of the action, would be in effect making such custodian a receiver, without

sureties, to guaranty the safety of the funds. This would not in general be a safe practice (Code Civ. Proc., § 232), although in the present case the custodian, being a national bank, may have lessened the necessity for such security. If, therefore, the plaintiff was entitled to have the court take into control the fund in dispute, this should have been accomplished through the instrumentality of a receiver, clothed with power to get possession of the property, and hold the same, under bond, to insure its safety, awaiting the determination of the action. Incidentally thereto an injunction may have been proper to restrain defendant Perkins from interference with said property, or the lawful action of the receiver.

This leads to the question whether the facts set forth would warrant the appointment of a receiver. If it appeared from the verified allegations of the complaint that defendant Perkins was insolvent, or said fund was in danger of being lost, squandered, or removed from the jurisdiction, we should unhesitatingly hold it a proper case for a receiver, on the execution and delivery of the undertaking mentioned in section 231 of the Code of Civil Procedure; but no such facts are alleged. The statute on this subject provides: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof—*First*, in an action by a vendor to vacate a fraudulent purchase of property; or by a creditor to subject any property or fund to his claim; or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff; or of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable; and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." (Code Civ. Proc., § 229.) This statute declares the general doctrine on this subject long prevailing in courts of equity. We regard the case at bar as clearly standing within the category of cases mentioned in the first subdivision of this section of the statute. It should be observed that in the present case all the joint operations and transactions in respect to said property and business have been consummated, and there appears to be no unsettled affairs concerning those transactions, except the collection of a balance owing on the price for which the property

was sold. There remains simply a dispute as to the proper apportionment of the fund arising from said transaction, between the joint owners. Herein this case is distinguished from those cases arising out of partnership relations, where, during the progress of a copartnership business, one partner is wrongfully excluded from possession and participation in the management of the property and affairs of the firm, in violation of his rights under the compact; and upon such showing a receiver is appointed to take possession of the partnership property, and wind up its affairs. (2 Lindley on Partnership, 551.) Inasmuch as plaintiff has sought to get sufficient of said fund into the custody of the court to answer his claims, and the court, in taking jurisdiction thereof, although through somewhat irregular proceedings, has required bond to guaranty defendant such damages as he might sustain by reason of withholding said fund from his control, we will not order dissolution of said injunction *instante*; but direct that unless plaintiff promptly, upon return of remittitur, make such proper showing as will warrant the appointment of a receiver, according to the practice in such cases, as suggested above, under such order as the trial court may make, allowing amendment or supplemental pleading, then the court shall dissolve said injunction, and release the parties from the effect thereof; but if a sufficient showing be made to warrant the appointment of a receiver, then such remedy may be granted.

Order modified.

PEMBERTON, C. J., and DE WITT, J., concur.

CREEK, APPELLANT, v. McMANUS ET AL., RESPONDENTS.

[Argued October 27, 1892. Decided April 10, 1893.]

NONSUIT—Instruction to jury.—An instruction to the jury to find for the defendant, given on motion in a civil action at the close of plaintiff's case upon the ground of failure of proof, is in effect a nonsuit. (*McKay v. Montana Union Ry. Co.*, *ante*, p. 15, cited.)

Same—Appeal.—In reviewing a judgment rendered on motion for a nonsuit, all facts will be considered as proved which the evidence tends to prove. (*Herbert v. King*, 1 Mont. 475; *Gans v. Woofolk*, 2 Mont. 463, cited.)

INJUNCTION—Attorney's fees—Damages.—Attorney's fees paid to procure the dissolution of an injunction are recoverable as an item of damages in an action on the bond given in the injunction suit.

13	152
18	291
13	323
32*	675
34*	58
34*	304
13	152
14	288
32*	675
36*	183
13	152
15	179
15	433
15	586
32*	675
38*	888
89*	457
39*	906
13	152
d17	446
13	152
18	257
19	453
13	152
d23	817
13	152
24	122
152	
324	

SAME - Same—Proof.—In an action upon an injunction bond where attorney's fees paid to procure a dissolution of the injunction are sought to be recovered as damages, testimony by the plaintiff that she paid a certain fee to an attorney for "dissolving the temporary injunction," and "to resist the perpetual injunction," tends to prove such item of damages without apportioning the fee between the two services, where the right to an injunction was the only cause of action set up in the suit in which such bond was given, and the only service that was or could have been rendered by the defendant's attorney in the injunction suit was confined to defeating the injunction, whether by motion or by a trial of the case. (*Miles v. Edwards*, 6 Mont. 180, cited; *Campbell v. Metcalf*, 1 Mont. 378; *Allport v. Kelley*, 2 Mont. 343; *Parker v. Bond*, 5 Mont. 14, distinguished.)

TRIAL—Exclusion of evidence after demurrer overruled—Amendment.—Where a demurrer to a complaint has been overruled, it is error for the court to exclude evidence offered to prove the allegations at which the demurrer had been directed, upon the ground that such allegations were insufficient to admit the proof, without first giving the plaintiff an opportunity to amend the complaint.

Appeal from Ninth Judicial District, Gallatin County.

Action upon an injunction bond. Judgment was rendered for the defendants below by ARMSTRONG, J. Reversed.

Statement of facts, prepared by the judge delivering the opinion.

The plaintiff brought this action to recover against the defendants damages for the alleged wrongful issuance of an injunction. McManus, defendant herein, brought an action for an injunction against this plaintiff, and, in such action, gave the statutory undertaking, with Cline and Davis, the other defendants herein, as sureties. That action was for an injunction only. In that action the plaintiff herein and defendant therein recovered judgment for costs, and for the dissolution of the injunction. In the case at bar she seeks damages occurring by the issuance of that injunction. The judgment in this case was for defendant, and plaintiff herein appeals. The case was tried to a jury. At the close of the evidence for the plaintiff, the defendant moved the court "to instruct the jury to bring in a verdict for the defendant, on the ground of a failure of proof by plaintiff." This motion was granted, and the court instructed the jury accordingly. In pursuance to the instruction, the jury found for the defendants, and judgment was thereupon entered. From this judgment the plaintiff appeals.

13	152
35	28
13	152
41	24
41	572

E. P. Cadwell, for Appellant.

I. A nonsuit is an adjudication of the court, and it matters not whether the court manifest that decision by an instruction to the jury, or discharging it and ordering the clerk to enter judgment for the defendants, or directs a *pro forma* nonsuit on its own motion or motion of the defendants, the result is the same. The instruction to find for the defendants was for all practical purposes a nonsuit, and must be governed by the rules governing nonsuits.

II. The motion to instruct the jury to find for defendant should have been overruled, because it does not specify in what particular the pleadings are insufficient, so that an opportunity could be given plaintiff to have secured leave to amend his complaint. (*Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463; *Raimond v. Eldridge*, 43 Cal. 506; *Baker v. Joseph*, 16 Cal. 173; *Dow v. Gould & Curry etc. Co.*, 31 Cal. 651, 652; *Cravens v. Deway*, 13 Cal. 40; *Pratt v. Hull*, 13 Johns. 335; *Darst v. Rush*, 14 Cal. 82; *McKee v. Greene*, 31 Cal. 418; *Dero v. Cordes*, 4 Cal. 118; *Labar v. Koplin*, 4 N. Y. 547; 16 Am. & Eng. Ency. of Law, page 741; *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; *Coffey v. Greenfield*, 62 Cal. 604; *People v. Banvard*, 27 Cal. 470; *Sanchez v. Neary*, 41 Cal. 485; *Kiler v. Kimbal*, 10 Cal. 267; *McGarrity v. Byington*, 12 Cal. 426.)

III. The court held the allegations of the complaint sufficient on demurrer to entitle her to a recovery in every particular in which she sought a recovery, and there being no specification in what the complaint was insufficient upon the trial, the plaintiff could not ask for leave to amend, to supply the defect. (*Newell v. Meyendorff*, 9 Mont. 254; 18 Am. St. Rep. 738.) The complaint stated cause of action, and if it was susceptible to a demurrer it was one to make more definite and certain, and not for insufficiency of statement of fact.

IV. The motion should not have been sustained because there was proof tending to show that the plaintiff was damaged by reason of having been obliged to pay an attorney's fee of one hundred dollars to defeat the securing of a perpetual injunction. The suit of the defendant John McManus and this plaintiff was solely and only for the purpose of securing

a perpetual injunction; and whatever was paid by the plaintiff to her counsel in that case was paid to defeat the permanent injunction, and she thus brought herself within the rule laid down in *Miles v. Edwards*, 6 Mont. 180. (See, also, *Wilson v. McEvoy*, 25 Cal. 174; *Pinney v. Hershfield*, 1 Mont. 368; *Kent v. Snyder*, 30 Cal. 666; *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492; *Tarpey v. Shillengberger*, 10 Cal. 391; 10 Am. & Eng. Ency. of Law, p. 988; High on Injunctions, §§ 973, 974; Sutherland on Damages, pp. 141, 142.)

V. The court committed error by refusing to allow the plaintiff to prove the value of the crop lost by reason of the service of said injunction. (See *Aldrich v. Reynolds*, 1 Barb. Ch. 616; *Edwards v. Edwards*, 31 Ill. 474; *Dougherty v. Dore*, 63 Cal. 170; High on Injunctions, §§ 1663-73; 2 Sutherland on Damages, §§ 68-70; *Meysenburg v. Schlieper*, 48 Mo. 426; *Riddlesbarger v. McDaniel*, 38 Mo. 138.)

Luce & Luce, for Respondents.

I. There is no cause of action stated in the amended complaint, with the possible exception of the allegations as to the employment and payment of an attorney "to procure the dissolution of said injunction"; and as that allegation is joined with the allegation that such employment and payment were "in order to defend said suit" the whole paragraph is insufficient, and no proof thereunder was admissible. No motion was made to dissolve the injunction and no services were ever rendered by the attorney for defendant in that suit in or about that injunction. It is certain that it must be conceded that there never were any services rendered by any attorney for the defendant in the old suit except on the merits of the case, and that no motion was ever made to dissolve the injunction. There was no proof of any sum paid for services in the matter of the temporary injunction. Such being the facts there could have been no damages so far as attorney's fee was concerned "by reason of said injunction." (*Campbell v. Metcalf*, 1 Mont. 378; *Allport v. Kelley*, 2 Mont. 343.)

II. The motion was not for a nonsuit; it was for the court to instruct the jury to bring in a verdict for the defendants, and the question is whether the court's instruction was correct.

The grounds in that motion and in the instruction are as specific as it is possible from the nature of the case to make them. They state that there had been no testimony offered proving or tending to prove any allegation in the complaint. The defects had been pointed out by the demurrer and also by the many objections on which testimony had been excluded. Appellant could have amended even after the instruction was given if there had been any grounds therefor. (*Wormall v. Reins*, 1 Mont. 627; *Hartley v. Preston*, 2 Mont. 415; *Hershfield v. Aiken*, 3 Mont. 443; *Randall v. Greenhood*, 3 Mont. 506; *Anderson v. Hulme*, 5 Mont. 295.) The objection all the way through to the complaint was both by demurrer and by objections to testimony that it did not state a cause of action for any of the several alleged damages. This objection could be taken for the first time in the supreme court, and this ground is never more specifically stated than in the language of the 6th subdivision of section 87 of the Code of Civil Procedure, and is never waived. (*Parker v. Bond*, 5 Mont. 1; *Kent v. Snyder*, 30 Cal. 667; *White v. Fratt*, 13 Cal. 521; *Haskell v. Moore*, 29 Cal. 437; *Anderson v. Hulme*, 5 Mont. 295.) Formerly it was held that if there was a scintilla of evidence in support of a case the judge was bound to give the case to the jury; but that doctrine is exploded. (*Commissioners v. Clark*, 94 U. S. 278; *Improvement Co. v. Munson*, 14 Wall. 442, and cases cited, 448; 11 Am. & Eng. Ency. of Law. pp. 243, 244, 245, and cases cited.) But it is not a question of nonsuit, but a question of the power of the court to direct a verdict in a case where there is an entire failure of proof, and where no verdict for plaintiff could be sustained. Where the case is such that the court would be compelled to set aside a verdict if rendered in favor of a party, because not reasonably supported by the evidence, the court may direct a verdict for the opposite party. (*Thompson v. Pioneer Press Co.*, 37 Minn. 285; *National Ex. Bank v. White*, 30 Fed. Rep. 412; *North Pacific R. R. Co. v. Bank*, 123 U. S. 727, and cases cited; *Anderson Co. Commiss. v. Beal*, 113 U. S. 228, and cases cited; *Pleasants v. Fant*, 22 Wall. 116-20; *Herbert v. Buller*, 97 U. S. 319, 320; *Bevans v. United States*, 13 Wall. 56; *Walbrun v. Babbitt*, 16 Wall. 577; *Hendrick v. Lindsay*, 93 U. S.

143; *Arthur v. Morgan*, 112 U. S. 495; *Dwyer v. Kalteyer*, 68 Tex. 554; Code Civ. Proc., § 262, subd. 6; *Jackson v. Jacksonport*, 56 Wis. 312; Thompson on Charging Jury, 44, 47; Proffatt on Jury Trial, §§ 351-54; *Harris v. Woody*, 9 Mo. 113.)

DE WITT, J.—Appellant contends that the granting of the motion to instruct the jury to find for the defendants was error. This action by the court in a civil case was practically, in effect, the granting of a nonsuit, and must be classified and treated as a nonsuit. That this is the proper view of that action by the court was so fully, and, to my mind, satisfactorily, treated in the recent case of *McKay v. Montana Union Ry. Co.*, *ante*, p. 15, that it would not be profitable to add to the remarks made in that case. In reviewing the judgment rendered upon the sustaining of that motion for a nonsuit, all facts will be considered as proved which the evidence tends to prove. (*Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463.)

Does the evidence in this case tend to prove any cause of action? The cause of action was for damages occurring by reason of the injunction action of defendant herein against plaintiff herein. One item of the alleged damages is pleaded in the complaint in this case as follows: "That in order to defend said suit and to procure the dissolution of said writ of injunction, this plaintiff (defendant therein) was obliged to and did employ an attorney at an expense of one hundred dollars, which sum so paid was a reasonable sum for said services." We think that there was evidence tending to sustain this allegation. This action of *McManus v. Creek* was for an injunction only. The injunction was not asked for in connection with any other cause of action, nor were any damages claimed, nor was any other relief than the injunction asked. Nothing was obtained by plaintiff in that action except a temporary injunction. That temporary injunction was dissolved on the trial of the action, and not upon a separate motion made for that purpose. Plaintiff testified on her examination as a witness as follows: "I am the plaintiff in this case. I was the defendant in the case of *John McManus v. Rachael E. Creek*, that was tried about a year ago, and in that case I employed a person to resist the injunc-

tion which had been served on me in that case. I employed Judge Liddell to dissolve the temporary injunction, and to resist the perpetual injunction, and that was the only purpose for which I employed him in that case." Respondent contends that the fee paid to the attorney for "dissolving the temporary injunction" and "to resist the perpetual injunction" is not by the evidence apportioned between these two services, and that the jury could not determine what portion of the one hundred dollars was paid for dissolution of the injunction. (*Campbell v. Metcalf*, 1 Mont. 378.) But in that case the fees paid to the attorneys were in an action brought to recover possession of a mining claim. In that action an injunction was procured. The fees were paid to the attorneys in a gross sum for their services in determining the title to the property, and in procuring a dissolution of the temporary injunction. It appears in the evidence that there were these two separate and distinct services. It did not appear what portion of the fees were paid for dissolving the injunction, and what portion for determining the title to the property. The court said: "As there was no evidence to show how much money had been paid to procure the dissolution of this injunction, it was improper for the court to give any instruction which would lead the jury to consider the matter."

But in the case at bar the right to an injunction was the only cause of action set up or litigated, and no services could have been rendered for any other purpose. Upon the trial the temporary injunction was dissolved, and a perpetual injunction denied, at one stroke, and by one service of the attorney. The damages caused the plaintiff herein were caused by the action of *McManus v. Creek*, and the issuance of the temporary injunction on the complaint therein. The defendant employed an attorney to resist that injunction. Instead of attacking the temporary injunction, which was in force, by a distinct motion for that purpose, the attorney dissolved it by another sort of attack. He assaulted the very foundation of the injunction—that is, the action in which it was granted—and demolished the whole structure by one effort. These facts render applicable the case of *Miles v. Edwards*, 6 Mont. 180, in which case, as in the case at bar, the only cause of action was the injunc-

tion. Therefore, *Miles v. Edwards* and the case now before us are distinguishable, as above noted, from *Campbell v. Metcalf*, 1 Mont. 378; and also from *Allport v. Kelley*, 2 Mont. 343, and *Parker v. Bond*, 5 Mont. 14, in which latter cases, as well as in *Campbell v. Metcalf*, 1 Mont. 378, there was a main cause of action involving the title to property, and the injunction, as remarked in *Miles v. Edwards*, 6 Mont. 180, was only ancillary thereto. It therefore appears herein that the fee paid the attorney was paid wholly on account of the injunction and for services as to no other cause of action than the injunction. We are therefore of opinion that there was evidence tending to prove damages occurring to plaintiff by reason of being obliged to pay attorney's fees in the injunction action. Such damages may be recovered in an action upon the undertaking given in the injunction suit. See cases above cited in this opinion.

We will notice the error claimed in exclusion of testimony. The complaint alleges that, by the said wrongful issuance of the injunction, the plaintiff sustained damages in the loss of crop, which she says are particularly set forth, as follows: "That the loss of crop caused by this plaintiff [defendant therein] not being able to secure water through said irrigating ditch, so commenced, to properly irrigate them, by reason of her stopping work thereon, by reason of said injunction being so wrongfully issued and served, in the sum of one hundred and fifty dollars." A demurrer by defendant was directed at this paragraph of the complaint, as follows: "That said complaint does not state facts sufficient to constitute a cause of action for the damages alleged in paragraph 8 thereof." The district court overruled this demurrer, thereby declaring its view, and the law of the case for the time, that this paragraph of the complaint was a sufficient allegation of damages. Upon the trial, plaintiff offered evidence tending to show in detail the destruction of her crop of grain by reason of the deprivation of the water, and the value of the same, and the damages. The court refused to admit this evidence, on the ground that the allegation of special damages in the complaint was not sufficient. It may be that the allegation of damages to the crop, as set out in the complaint, should have been more complete

in alleging the kind and quantity of the crop, and the amount of profits of which plaintiff was deprived. (*Carron v. Wood*, 10 Mont. 507, 508.) The infirmity in the allegation is probably not of such vital character, however, that it could have been urged by defendant after he had answered, if verdict and judgment had followed for plaintiff. But the court, on demurrer, had held this allegation of the complaint sufficient. Then, on the trial, when it excluded plaintiff's proffered evidence, it, in effect, held the allegation to be insufficient. Plaintiff, after the court had told her that her complaint was good, went into the trial rightfully relying upon that ruling. If the court had obtained further light upon the subject, and had concluded that its ruling upon the demurrer was wrong, it should have given plaintiff an opportunity to amend her complaint before ruling out all her evidence; for, as the trial went, the plaintiff, by relying upon the first ruling of the court as to the sufficiency of her complaint, was defeated in offering her evidence to sustain the complaint, because the court had in the mean time concluded that the complaint was insufficient. We are of the opinion that this was an error. These remarks also apply to other exclusions of evidence specified by appellant on the ground that the complaint was insufficient, whereas the court had, on demurrer, held that in these respects the complaint was sufficient. The judgment is reversed, and the case is remanded for a new trial.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

STATE, RESPONDENT, v. BAKER, APPELLANT.

[Argued, March 15, 1893. Decided, April 13, 1893.]

13	160
18	61
13	100
28	20
f28	21
13	160
e7	462
13	160
f28	10

CRIMINAL LAW—Homicide—Instructions, duty of the court as to.—It is the duty of the court upon a trial for murder, where all the degrees of homicide are submitted to the jury as issues to be passed upon and determined, to clearly define in its instructions each degree of homicide of which the defendant could be convicted.

SAME—Same—Definition of murder in second degree.—Where no other definition of murder in the second degree is given by the court in its instructions than that which is found in the words of the statute attached to the definition of murder in the first degree, to wit, "all other kinds of murder shall be deemed

murder in the second degree" the omission is error, as such definition does not distinguish it from murder in the first degree and manslaughter so that the jury could determine from the evidence of which of the degrees defendant was guilty.

SAME—Same—Manslaughter—Sufficiency of instruction.—An instruction that "if the jury believe from the evidence that the defendant had been injured or received provocation from the person killed, whatever that injury or provocation might have been, yet if, after receiving such injury or provocation there should have been an interval between the provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and shall be deemed murder in the first degree," while not fatally defective when considered with the whole charge, is unnecessarily narrowed in omitting the words of the statute qualifying provocation, and also all reference to "time for the passions to cool" in referring to the interval of time for the voice of reason to be heard.

Appeal from Seventh Judicial District, Custer County.

Conviction for murder in the first degree. Defendant was tried before MILBURN, J. Reversed.

Middleton & Light, for Appellant.

Henri J. Haskell, Attorney-General, J. W. Strevell, and T. J. Porter, for the state, Respondent.

PEMBERTON, C. J.—On the third day of December, 1892, the appellant was convicted of the crime of murder in the first degree, and on the tenth day of the same month the judgment of the lower court was rendered that the appellant be hanged on a day therein named. The appellant moved for a new trial. The motion was denied. From the order overruling said motion, as well as the judgment of the court, this appeal is prosecuted.

The principal error assigned is as follows: "That the court, by instructions, authorized the jury to find the defendant guilty of murder in the first degree or manslaughter, and did not sufficiently or at all define murder in the second degree in his instructions." From an inspection of the record, it appears that the court below in its instructions defined murder in the first degree and manslaughter, the only definition of murder in the second degree being found in these words of the statute, attached to the definition of murder in the first degree, to wit: "All other kinds of murder shall be deemed murder in the second degree"; and, without any other definition of murder

in the second degree, the court in its instructions in several places told the jury that they were authorized, if the evidence warranted it, to find appellant guilty of either murder in the first degree, murder in the second degree, or manslaughter, under the information in this case.

The question for this court to determine is, whether this was a sufficient definition of murder in the second degree to enable the jury to determine the essential characteristics of this degree of homicide. It was the duty of the court to so fully declare the law by its instructions upon every degree of crime of which the appellant could be convicted under the information, as to give him the benefit of having the evidence considered by the jury, under a full knowledge of all the essential elements of each degree of crime for which a verdict could be rendered against him. We think the authorities are substantially uniform upon this subject. This doctrine is fully and forcibly discussed in *State v. Meyer*, 58 Vt. 457, under a statute like ours, in which case the court says: "The reading of the statute, declaring what was murder in the first degree, and that all other kinds of murder shall be murder of the second degree, was not a sufficient explanation of the two degrees. The jury, from that reading, without explanation, would have no appreciation of the distinguishing characteristics of the two degrees, which have confessedly been something of a puzzle to lawyers and judges. How many would understand from the reading of the statute defining the first degree of murder and the phrase, 'All other kinds of murder shall be murder of the second degree,' what in fact constituted murder in the second degree? How many men not read in the law would understand from it that murder in the second degree is the unlawful killing of a human being with malice aforethought, but without deliberation, premeditation, or preconcerted design to kill, and that the distinguishing feature of the two degrees rests in the absence of deliberation, premeditation, and preconcerted design from the second degree?" This case is exactly like the one under discussion. In both cases the trial court read the statutes defining the different degrees of homicide, or copied them into their instructions verbatim. The reasoning in *State v. Meyer*, *supra*, seems so convincing and con-

clusive that any other conclusion than therein stated seems to be unauthorized. This view of the law is supported by the following authorities. (Wharton's Criminal Pleading and Practice, § 709 et seq.; *State v. Brainard*, 25 Iowa, 572; *Owen v. Owen*, 22 Iowa, 270; *Wynne v. State*, 56 Ga. 113; *Lancaster v. State*, 3 Cold. 339; 91 Am. Dec. 288; *State v. Wyatt*, 50 Mo. 309; *Territory v. Scott*, 7 Mont. 407; Criminal Practice Act, § 326; 1 Bishop's Criminal Procedure, § 980.) From a consideration of these authorities we are of opinion that the court, in its instructions, should have fully and completely defined murder in the second degree, distinguishing it from murder in the first degree and manslaughter, so that the jury could have had before them all the essential elements of each of these degrees of homicide, so that they could intelligently determine from the evidence which of the degrees appellant was guilty of, if guilty at all. In cases where it is clear to the mind of the court that there is no evidence to reduce the killing to any lower degree of homicide than murder in the first degree—for instance, in cases where the death is produced by poisoning or lying in wait—the court is justified in refusing to instruct the jury in relation to such lower degrees of homicide. But this case is widely distinguished from such cases. In this case all the degrees of homicide known to our statute were submitted to the jury as issues to be passed upon and determined by the evidence and instructions of the court. In such cases the court should clearly define in its instructions each degree of homicide. This was not done in this case, and we think the omission was error.

Instruction 16, given by the court, is as follows: "If the jury, from the evidence in this case, believe, beyond a reasonable doubt, that the defendant, at or about the time charged in the information, killed Austin McDonald at and within the county of Custer, then it will devolve upon the jury, under the evidence, to determine what degree of offense such killing constituted; and if the jury believe from the evidence that the defendant had been injured or received provocation from the person killed, whatever that injury or provocation might have been, yet if, after receiving such injury or provocation, there should have been an interval between the provocation given

and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and shall be deemed murder in the first degree, and the jury should so find by their verdict." We think this instruction is narrowed unnecessarily by the court, while it might not be considered fatally defective when taken in connection with the whole charge. In drawing the distinction in this instruction between murder in the first degree and manslaughter, the court omitted the words qualifying the provocation; and also, in his reference to the interval of time for the voice of reason to be heard, he omits all reference to time for the "passions to cool." These words were put into the statute by the legislature for a purpose, and it is dangerous to omit these statutory words defining any degree of homicide in a charge to the jury, unless the court is careful in using words equivalent in meaning. The order overruling the motion for new trial is overruled; the judgment is reversed, and a new trial ordered.

Reversed.

HARWOOD and DE WITT, JJ., concur.

STATE, RESPONDENT, v. RUSSELL, APPELLANT.

[Argued March 15, 1893. Decided, April 17, 1893.]

CRIMINAL LAW—Change of venue—Prejudice.—An application for a change of venue in a criminal case, when made upon the ground that a large number of jurors who were examined as to their qualifications stated that they had formed opinions as to the guilt or innocence of the defendant; that such statements made in the presence of jurors who had been accepted tended to prejudice the latter against the defendant and that the inhabitants of the town where the trial was being held were particularly prejudiced against defendant, and were likely to communicate this prejudice to jurors summoned from the vicinity, is properly denied where such jurors as had been accepted stated, under examination by the court, that they had not been prejudiced by the statements of the other jurors, and the court offered to excuse from the box jurors who resided in the town.

SAME—Dying declarations—When admissible.—Dying declarations are admissible in evidence when all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding the declarant may not have said he was without hope of recovery, or was dying, or going to die.

SAME—Same.—Where it appeared that at the time dying declarations were made deceased was mortally wounded and in a dying condition, but was rational, and appreciated his condition, and stated that he wanted a Christian burial, and

13	164
17	425
13	164
18	63
13	164
21	558

where he wanted to be buried, and that he wanted a headstone at his grave; told where his money was, and by whom and how he was wounded, a sufficient foundation for the admission of the declarations is shown.

SAME—Witness for state—Refusal to call.—It is not error for the court to refuse to require the state to call a witness whose name was indorsed on the information where she was not an eyewitness and was not present at the time of the shooting and the materiality of her evidence was not shown.

SAME—Murder—Sufficiency of evidence.—Evidence in the case at bar reviewed and held to amply sustain and justify the verdict and judgment.

Appeal from Seventh Judicial District, Yellowstone County.

Conviction for murder. Defendant was tried before MIL-BURN, J. Affirmed.

Middleton & Light, for Appellant.

Henri J. Haskell, Attorney-General, for the state, Respondent.

PEMBERTON, C. J.—The appellant was convicted of the crime of murder in the second degree at the September term, 1892, of the district court of the seventh judicial district in the county of Yellowstone; and on the eighth day of October, 1892, was, by the judgment of said court, sentenced to imprisonment in the state prison for a term of twenty-five years. The appellant moved the court for a new trial, which was denied. From the order refusing a new trial, and from the judgment of the court, this appeal is prosecuted.

The first important error assigned is, the refusal of the court below to grant appellant's petition for a change of venue from Yellowstone county. It appears that after the trial had commenced, and considerable progress had been made in an effort to obtain a jury, the counsel for appellant came to the conclusion that a fair trial could not be had in said county, and presented a petition for a change of venue, based upon the alleged "interest, prejudice, and bias of the people of said county." This petition was supported by the affidavit of two of the counsel for the appellant. This affidavit is to the effect that during the time an effort was being made to procure a jury, a large number of persons were called into the jury-box, and examined as to their qualifications to act as jurors in the case; that a large proportion of such persons, upon said examination, stated

that they had formed and expressed decided opinions as to the guilt or innocence of the prisoner at the bar ; that such statements by such persons on their examination, made in the presence of the jurors in the box who had not been challenged for cause, had the effect, in affiant's opinion, to prejudice such jurors as were in the box against the appellant to such an extent as to prevent his having a fair trial before such jury; that the inhabitants of Billings were especially hostile to the appellant, and prejudiced against him to such an extent that, in the opinion of affiants, he could not have a fair trial ; and that the prejudice of the inhabitants of Billings was likely to be so communicated to persons summoned as jurors from its immediate vicinity as to prevent them from according appellant a fair trial, if accepted as jurors in the case ; that there was considerable unfriendly talk among the people of Billings against appellant; and that for these reasons affiants believe the prisoner could not have a fair trial in that county. The court also heard oral evidence of other witnesses to substantially the same effect. To meet this evidence, the court examined each juror in the box, as to whether or not the examination of persons called as jurors in their presence had an effect in prejudicing their minds against the prisoner. Each of said jurors answered in the negative. The court, in addition thereto, of its own motion, offered to excuse from the jury all persons who resided in Billings; two such persons being in the box. To this offer the counsel for the appellant objected. If it is true, as contended by appellant, that in criminal cases, where a large number of persons are examined, in the presence of each other, as to their qualifications to sit as jurors, and a large or any portion of them state that they have formed or expressed such opinion as to the guilt or innocence of the person to be tried as to disqualify them as jurors, it shall be considered as a sufficient reason to prejudice those who have no opinions, and thus disqualify them from being considered fair and competent jurors, then we are at a loss to know how a jury can ever be organized in any important criminal case in any community. In almost every important criminal case a very large proportion of the people living in the immediate vicinity of the place where the crime is alleged

to have been committed from such opinions, from becoming familiar with the facts, as to disqualify them from acting as jurors in the trial of the case, and these opinions are as likely to be favorable as hostile to the accused. But how can it be rightfully contended that the examination of such persons, and their statements that they have such disqualifying opinions, in the presence of persons who do not have such opinions, will prejudice and disqualify those that are free from such disqualifications to such an extent as to endanger a fair trial of the person accused of the crime? We do not think this position can be sustained by reason or law. The court seemed to have taken every necessary precaution to assure the appellant a fair trial in this respect.

And the verdict of the jury, finding the appellant guilty of murder in the second degree, and leaving the punishment to be fixed by the court, when they could, if so inclined, for any reason, have assessed his punishment at imprisonment for life, tends to show that the appellant and his counsel were mistaken as to the prejudice alleged as a ground for change of venue, and that the view of the court was justified in its ruling in this regard. We are unable to see that the court below abused that sound judicial discretion required of trial courts in such proceedings. The law governing change of venue is well settled in this state in (*Kennon v. Gilmer*, 5 Mont. 257; 51 Am. Rep. 45), and (*Territory v. Manton*, 8 Mont. 95); and these authorities support the action of the court below in this case.

2. It is urged that the court below erred in admitting the evidence of the dying declaration of the deceased. The appellant objected on the ground that a sufficient foundation had not been shown to render the dying declaration admissible. The evidence does not show that deceased actually said he was without hope of recovery, or that he was going to die. The evidence of the surgeon who attended him is to the effect that, a short time before he died, deceased frequently said, "My God, boys! I am killed." "Oh, boys! I am shot through the guts." The evidence of the surgeon shows he was mortally wounded, and was in a dying condition when these expressions were used, and that he was rational, and appreciated his condition. Harry Ramsey, who was with him just before

his death, testified that the deceased was rational, and talked to him as if he knew that he was in a dying condition, but does not remember the exact words deceased used. That the deceased stated he wanted a Christian burial; told where his money was, and who had it; that he wanted to be buried at Billings; wanted a headstone, with his name on it, placed at his grave, so that, if his friends ever wanted to take him up, they could do so. There is no evidence that indicated that he had any hope of recovery. That he stated by whom and how he was wounded, and a few moments thereafter died. The principal objection urged to this evidence is that the declarant did not expressly state that he had no hope of recovery, or was going to die. We do not think that it was essential to the admissibility of this evidence that he should have so expressly stated.

In 1 Greenleaf on Evidence, 14th ed., § 158, the doctrine governing the admissibility of dying declarations as evidence is thus stated: "SEC. 158. Must be under a sense of impending death. It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or to be inferred from his evident danger, or the opinions of medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of declarant's mind." To the same effect, see *People v. Taylor*, 59 Cal. 640; *Hill v. State*, 41 Ga. 484; Wharton's Criminal Evidence, 8th ed., § 282; 7 Am. & Eng. Ency. of Law, 107, 109, note 1, and cases cited.

These authorities all hold that if all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding declarant may not have said he was without hope of recovery, or was dying, or going to die, then such declarations are admis-

sible in evidence. The facts and circumstances surrounding the declarant in this case at the time of the making of the declaration warrant the conclusion that they were made under a sense of impending death, and, we think, were properly admitted as evidence to the jury.

3. It is also urged as error in the court below that the prosecuting attorney had indorsed on the information the name of one Mollie Dalton as a witness, and that on the trial he declined to call her as a witness for the state, and that the court refused to require him to do so. The evidence shows that Mollie Dalton was not an eyewitness to the transaction, was not present at the time of the shooting, and the materiality of her evidence is nowhere shown. There is nothing in the record to show that this witness comes within the rule of any of the authorities cited or applicable to support appellant's contention. The attitude of this witness to the case does not bring her within the rule announced in the case of *Territory v. Hanna*, 5 Mont. 248. In that case the witness was present during the commission of the crime, and was so stated to be present by the prosecuting attorney on stating his case to the jury. The facts here are entirely different. We think the court went fully as far in *Territory v. Hanna* as it was authorized to go. But that case is not authority in this case, for the reason that the facts are widely different. In this case the evidence shows that the witness was not present at the shooting, and her examination by the appellant showed her testimony to have been immaterial. We see no error in the action of the court in this respect.

4. It is contended that the evidence does not sustain or justify the verdict and judgment of the court below. There is no controversy in this case as to the shooting, and its fatal result, or as to the identity of the slayer. The killing appears to have been unnecessary. There was no effort on the part of the appellant to avoid the killing. There is no evidence of danger to the life of appellant, or of his receiving great bodily harm at the hands of the deceased, at the time of the shooting. The deceased was wholly unarmed. He was a stranger, comparatively, in the house, at the time of the shooting, and evidently intoxicated. The appellant was armed, in the company

of his friends and acquaintances; and, if not actually inclined, certainly it does not appear he was disinclined, to enter into the difficulty that resulted in his killing the deceased. The actions of the appellant in failing to disclose himself to the officers, in whose presence he was, after the shooting, when such officers were looking and inquiring for the man who did the shooting, and his escape, are hardly consistent with the theory of self-defense or accidental shooting. The principal witnesses of the state were all intimate friends and acquaintances of the appellant, and their testimony was confessedly as strong in behalf of the appellant as they could consistently make it. But taking into consideration the dying declarations of the deceased, and all the facts and circumstances of the case, as shown by the record, we are of the opinion that the evidence amply sustains the verdict of the jury and the judgment of the court below. The judgment of the court below is affirmed, and it is ordered that the same be carried into effect according to the terms thereof.

Affirmed.

HARWOOD and DE WITT, JJ., concur.

13	170
15	264
33 ^o	753
38 ^o	1066
18	170
24	277

KELLEY, RESPONDENT, v. JEFFERIS, APPELLANT.

[Argued, January 30, 1893. Decided April 18, 1893.]

MARRIED WOMEN—Separate property *Net and sufficiency of record—Statutory construction.*—A chattel mortgage containing a complete description of the separate property of a married woman, executed by her and filed and properly indexed in the county recorder's office, is a sufficient list and record within section 1482, fifth division, of the Compiled Statutes (Act of 1872), exempting the property of a married woman from her husband's debts when mentioned in a list thereof on record in such office, no particular form of the list or method of record being provided for. (*Griswold v. Boley*, 1 Mont. 556, cited.)

SAME—Liability for husband's debts—Statutory construction.—Section 1489, fifth division, of the Compiled Statutes (Act of 1872), declaring in effect that women shall retain the same legal existence after marriage as before, and receive the same protection of her rights as a woman as her husband does as a man, and shall have the same right as her husband to appeal to the courts for redress for injuries to her person or property, so modifies the Act of 1872 (§ 1482) as to enable a married woman to hold her separate property as against her husband's creditors without having a list thereof on record, on showing facts establishing her individual title thereto.

SAME—*Property rights under Act of 1887*.—The said Act of 1887 is a legislative direction to the courts of this state, where a united jurisprudence of equity and law is administered, to disregard the ancient common-law fiction of the merger of a wife's legal personality in that of her husband, and to enforce and protect the rights of a married woman according to the doctrines of equity which considered her a *feme sole* as to her separate property.

Appeal from First Judicial District, Lewis and Clarke County.

Action for conversion. Judgment was rendered for plaintiff below by BUCK, J. Affirmed.

A. K. Barbour, and J. A. Carter, for Appellant.

I. The court below held that section 1439, the so-called Emancipation Act, repealed the Statute of 1872. It is true that section 1440 declares as follows: "All laws or portions of laws inconsistent with the foregoing (§ 1439) are hereby repealed"; but that does not of itself repeal the statutes in question. (Endlich's Interpretation of Statutes, § 205; *People v. Durick*, 20 Cal. 94; *Hickory Tree Road*, 43 Pa. St. 139; *State v. Macon Co. Ct.*, 41 Mo. 459.) For the legislature to say that a married woman retains the same legal existence and legal personality as before marriage is essentially judicial, and is therefore unconstitutional. (Cooley's Constitutional Limitations, 89, p. 108.) The so-called Emancipation Act (§ 1439) was passed while Montana was a territory. At that time the legislative power in each territory was vested in the governor and a legislative assembly (Mont. Comp. Stats., § 1846, p. 22); the judicial power was vested in a supreme court, district courts, probate courts, and in justices of the peace. (Mont. Comp. Stats., § 1907, p. 40.) And it was provided that the legislative power should extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. (Mont. Comp. Stats., § 1851, p. 23.) The organic act, unlike the constitutions of the states, is a grant, and not a restriction of power primarily possessed. The term "rightful subjects of legislation" is a restriction imposed by Congress on the grant. No legislature, as such, has any power other than that of making laws. Laws, in the sense in which the word is here employed, are rules of civil conduct. (*Ponder v. Graham*, 4 Fla. 43.) That marriage makes the hus-

band and wife one legal person was one of the best settled fictions of the common law. (Stewart's Husband and Wife, § 38.) Fiction is the legal assumption that something which is or may be false is true. The law-making power has no need to resort to fictions. It may establish its rules with simple reference to the truth; but the courts which are confined to the administration of existing rules, and which lack the power to change those rules, have frequently avoided the injustice that their application to the actual facts might cause, by assuming, in behalf of justice, that the actual facts are different from what they really are; its proper operation being to prevent a mischief, or remedy an inconvenience that may result from the general rule of law. (Bouvier's Law Dictionary; 3 Blackstone's Commentaries, 43.) Fiction is, in English law, an ancient substitution of legislation. (7 Am. & Eng. Ency. of Law, p. 957, n. 4.) We submit that fictions have always emanated from the judiciary, and that a proposition, declared a legal fiction, cannot be abrogated by direct legislation; and that the only province of the legislature concerning a legal fiction is to modify the incidents thereof. That by marriage the husband acquires title to the wife's personality is the rule of law at common law. (2 Blackstone's Commentaries, 433.) We submit that the foregoing proposition is an incident of the fiction of unity, and that it has never been declared in apt terms to be a legal fiction, nor that the proposition of the legal fiction of unity has never been declared in apt terms to be the rule of law. It is impossible for the legislature to convert a wife into a *feme sole*, so far as relates to her property, while she is to continue to discharge the duties of a wife. (See *Snyder v. People*, 26 Mich. 109; 12 Am. Rep. 302; *Bear v. Bear*, 33 Pa. St. 525; *Cole v. Van Riper*, 44 Ill. 58; *Walker v. Reamy*, 36 Pa. St. 414-16; *Avery v. Doane*, 1 Biss. 64; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Board of Trade v. Hayden*, 4 Wash. 263; 31 Am. St. Rep. 919; *Althen v. Tarbox*, 48 Minn. 18; 31 Am. St. Rep. 616; Bishop on Contracts, § 948, p. 373.) For the legislature to say that a married woman shall receive the same protection of all her rights as a woman which her husband does as a man, is nearly as supererogatory as to say that a defendant shall receive the

same protection of all his rights as a defendant which plaintiff does as a plaintiff, and is clearly incompetent, for all individual rights are protected by the administration of laws through the instrumentality of a judiciary. (See *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *Clapp v. Ely*, 27 N. J. L. 622; *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123; *Meyer v. Berlandi*, 39 Minn. 438; 12 Am. St. Rep. 663. See also *Calhoun v. McLendon*, 42 Ga. 405; *Bear v. Bear*, 33 Pa. St. 525; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361.) We cite authorities on the question of the unity of husband and wife not because all of such decisions were upon statutes identical with our so-called Emancipation Act, but to demonstrate that the fiction of unity must remain a solemn declaration of the nature of the relation, resting upon a matter of natural creation, not to be entirely swept away by a direct legislative enactment; and that the court below erred in its declaration of the repealing effect of the so-called Emancipation Act. We submit that under our plan of the people being sovereign, only the incidents of the fiction of unity should be deemed rightful subjects of legislation. (See Mont. Const., art. III, §§ 1, 30; *Bingham v. Miller*, 17 Ohio, 446; 49 Am. Dec. 471.)

II. There is no sufficient property list. The instrument in question was not even filed for record, but simply filed in an attempt to comply with the statutes relative to the filing of chattel mortgages. It is not on record; it is simply on file; and not legally on file, because it did not comply with the requirements of the statute. Record is a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. (Bouvier's Law Dictionary.) The mere filing of an instrument is insufficient as notice when the statute requires it to be on record. (*Ritchie v. Griffith*, 1 Wash. 429; 22 Am. St. Rep. 155; *Scott v. Doe*, Hemp. 275.) The converse of this proposition was held in *Chapin v. Kingsbury*, 135 Mass. 580.

F. N. & S. H. McIntire, for Respondent.

The decisions of this court show how long the "fiction of unity," as regards the wife's separate estate, has been abolished

and the common-law rule has been set aside. (*Griswold v. Boley*, 1 Mont. 545; *Boley v. Griswold*, 2 Mont. 447; *Palmer v. Murray*, 6 Mont. 125; 8 Mont. 174; *Palmer v. McMaster*, 8 Mont. 186.) "In all the states statutes have been passed destroying more or less the husband's common-law rights in his wife's property or in portions thereof, and securing such property to a greater or less extent to her own use and enjoyment." (Stewart on Husband and Wife, § 217.) Even is this so in England, the mother of that same common law that counsel urge upon us. (45 and 46 Vict., c. 75.) There is nothing in the point that the action of the legislature in defining the existence and personality of the wife is unconstitutional. There is no prohibition in our constitution against it (Stewart on Husband and Wife, § 9), and the matter was certainly a proper subject of legislation. This law was enacted before the adoption of the constitution, and is of equal force. (Const. of Mont., art. XX, § 1.) The statute (Comp. Stats., § 1439, div. 5) indicates the legislative intent so clearly that there can be no question of what it was; and as to that legal fiction that a man and his wife are one person it seems to us to have been torn to tatters in Montana. (Stewart on Husband and Wife, § 338.) We do not contend that all the disabilities of coverture at the common law have been swept away by the legislature, and in this respect agree with the views of *Bertles v. Nunan*, 92 N. Y. 152. So far as plaintiff's right to the property purchased with her money, owned by her before her marriage, is concerned, it was absolute (*Gauley v. Troy City Nat. Bank*, 98 N. Y. 487), and she may maintain suit in ejectment against her husband to recover her separate estate. (*Wood v. Wood*, 83 N. Y. 575.) Also in detinue, replevin, and as garnishee. (*Scott v. Scott*, 13 Ind. 225; *Jones v. Jones*, 19 Iowa, 236; *Howland v. Howland*, 20 Hun, 472; *Tunks v. Grover*, 57 Me. 586.) She may sue alone. (*Palmer v. Murray*, 6 Mont. 125.) The fact that the husband was in possession of the property does not affect the case at all. She could properly make him her agent. (*Palmer v. Murray*, 8 Mont. 184; Stewart on Husband and Wife, § 82.) If the husband is not liable for the debts of the wife contracted before marriage, and her rights are the same as his, certainly her

property should not be liable for his debts contracted before marriage. The true intent of the legislature on this question can be gathered by reading together the Compiled Statutes, §§ 1439, 1445.

II. The chattel mortgage was a sufficient notice to the world of the plaintiff's title to the property therein described, and even if a list of separate property was necessary the mortgage was sufficient as such. (*Griswold v. Boley, supra; Palmer v. Murray, supra; Montana Impr. Co. v. Colter*, 7 Mont. 541.) The defendant was a mere trespasser. In such case no list is necessary. (*Palmer v. Murray, supra.*) We maintain that since the adoption of section 1439 no list of separate property is necessary. A married woman's rights are the same as those of a *feme sole*.

HARWOOD, J.—This action is prosecuted to recover damages for the alleged wrongful seizure and conversion of personal property. Plaintiff, Violet M. Kelley, is and was a married woman, residing with her husband, James J. Kelley, in the city of Helena, county of Lewis and Clarke, Montana, during all the times when the facts in this case transpired. It appears that, at the time of her marriage, plaintiff possessed the sum of seven hundred dollars in money, her own individual property, acquired prior to marriage; that, soon after said marriage, plaintiff invested said money in certain articles of saloon furniture, described in the complaint, all alleged to be of the value of seven hundred dollars; that, after the purchase of said chattels, plaintiff executed and duly acknowledged, in the manner required by the laws of this state, an instrument intended to be a chattel mortgage on said furniture, which instrument was filed for record in the office of the county clerk and recorder of Lewis and Clarke county, where said property was situate; that said chattels were used as the furniture of a place in said city, where plaintiff carried on, in her own name, the business of selling, at retail, liquors, cigars, and other goods usually sold in a saloon; that plaintiff's husband acted as her agent in carrying on said business in plaintiff's name; that, while plaintiff so owned and used said furniture, the same was seized and sold by appellant, acting as sheriff of said county,

under execution issued against plaintiff's husband, to enforce a judgment obtained against him on his indebtedness, contracted and owing prior to his marriage with plaintiff; whereupon plaintiff instituted this action to recover the value of said property as damage for the alleged wrongful seizure and conversion thereof, alleging the same to be her sole and separate property. Defendant, by answer, denied the allegation of plaintiff's complaint, to the effect that she was the owner of said chattels, in her sole and separate right, or was entitled to the possession thereof, when defendant seized the same; and defendant set up the seizure, under execution issued upon said judgment, against James J. Kelley, in justification of the taking of said property. The trial resulted in judgment for the plaintiff in the sum of five hundred and fifty dollars, and costs of suit, for which defendant prosecutes this appeal.

The contention of appellant is that, admitting the facts to be as epitomized above in reference to said property, plaintiff is not entitled in law to recover damages for the seizure thereof by appellant, in satisfaction of the execution against plaintiff's husband. If respondent's claims upon the property in controversy were to be determined entirely by an application of the principles of the common law in relation to the rights and disabilities of married women on the subject of holding property, appellant would doubtless prevail in his contention that said property was subject to seizure and sale to satisfy the liability of plaintiff's husband. But there are statutes in this state, existing when these facts arose, which modify the rules of the common law in this respect; and this case, we apprehend, must be determined by a consideration and application of those statutes. An act of January 12, 1872, now constituting section 1432 of the Compiled Statutes, provides "that the property owned by any married woman before her marriage, and that which she may acquire after her marriage, by descent, gift, grant, devise, or otherwise, and the increase, use and profits thereof, shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years; provided, however, that the provisions of this chapter shall extend only to such property as shall be mentioned in a

list of the property of such married woman as is on record in the office of the register of deeds of the county in which such married woman resides." In 1874 another statute was enacted by the legislature, authorizing any married woman residing in this state to engage in and carry on business, as sole trader, in her own name, and on her own account; and providing that neither her property embarked in such business, nor the proceeds thereof, shall be subject to her husband's debts. By that statute the married woman intending to become such sole trader was required to make and acknowledge before any person authorized to take acknowledgment of deeds in Montana, and record in the office of the county clerk and recorder of the county wherein the business was to be transacted, her declaration, describing the proposed business, and setting forth her intention to engage therein as sole trader. (See Sess. Laws, 1874, p. 93; also same statute in sections 1433-38, div. 5, Comp. Stats.) This statute has been superseded by another of similar effect, but providing a different manner of procuring for record the declaration as sole trader. (Sess. Laws, 1891, p. 263.) These statutes as to married women becoming sole traders are referred to as showing the course of legislation in this jurisdiction respecting the property rights of married women; but it is not contended by either party that the statute in reference to married women becoming sole traders has any particular bearing upon this case. It was asserted on the argument that certain of plaintiff's merchandise, connected with said business, was seized along with the furniture; but plaintiff does not contend that she could hold the merchandise, because she had not complied with the statute as to sole traders. She insists, however, that the property under consideration in this suit was not in trade, nor in market for sale, but was simply chattels belonging to her, and in her personal use. The next statute relative to the rights of married women in Montana, which should be considered in determining this case, became a law in 1887, and reads as follows: "That from and after the passage of this act, women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and, for any in-

jury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone." (Comp. Stats., div. 5, § 1439.)

Plaintiff relies upon the provisions of the statute first and the last above quoted as sufficient to support her recovery upon the facts shown in this case. It is contended on her behalf that section 1432 was sufficiently complied with by filing in the office of the register of deeds of the proper county the instrument intended as a chattel mortgage on the property in question, and containing a complete list and description thereof executed by plaintiff to Weber & Meile Co., of Chicago, Illinois. The provisions of that section do not require any particular form of such list, nor that it shall be placed on record in any special way. Chattel mortgages filed and entered in the proper indexes, as required by the statutes of this state, are on record in the office of the register of deeds, to all intents and purposes, for giving notice of the contents thereof, although not required to be transcribed on to the pages of a book kept in said office. In that form the instrument mentioned contained a list of the property in question, on record in the office of the register of deeds of the county where plaintiff resided. It does not seem to be an unwarranted construction of said statute to hold that the legislature intended, as to the list required to appear "on record" in said office, that such list might appear by an examination of any records of said office, pertaining to property such as deeds, mortgages, or other conveyances or instruments of record, affecting the title, or showing apparent ownership, or interest in property, sufficient to put a party interested upon notice. Such records are readily accessible, and are usually consulted by those seeking information as to the ownership of property, so far as disclosed by the public records in said office. If the legislature intended to require that the record of a married woman's separate property should appear in any particular form or book or instrument recorded in that office, it seems reasonable to suppose such intent would be manifest by an appropriate provision of said act, designating the form or record wherein such list must appear. The most

reasonable conclusion, we think, is that the legislature, in view of the fact that persons investigating the records of said office as to the title of property are presumed to examine the various instruments of record there affecting title or showing apparent ownership, and take notice of the contents thereof, left this provision broad enough to include all such records. This appears to be the view held in *Griswold v. Boley*, 1 Mont. 556. Such record only gives notice that the property in question is ostensibly held in the name of a married woman as her own property. It would certainly not be conclusive evidence of ownership. The facts supporting ownership or acquirement of property through the source mentioned in the statute must exist, or the mere record would be unavailing. The facts set forth in this case as to the means whereby plaintiff acquired this property do not appear to be disputed.

Secondly, plaintiff relies upon the provisions of section 1439 of the statute to sustain her in holding said property in her own individual right, free from the liabilities of her husband. The provisions of that statute undoubtedly absolve married women from certain disabilities imposed upon her status by the common law. It appears to be aimed directly at the fiction of the common law, whereby the legal personality of the wife was regarded as merged by marriage in that of her husband. As one of the logical corollaries deduced therefrom, it became an established principle of the common law that the wife could not own and hold in possession personal property in her individual and separate right; but such property was deemed, in view of the common law, to be in possession of the husband, and subject to his dominion, disposition, and liabilities. Not only so; the personal property belonging to the wife of which the husband could obtain possession was deemed his property, and subject to his liabilities. While these were the prevailing rules of the common law founded upon the fiction that the wife's legal personality was merged in that of her husband by marriage, and this doctrine, with its attending hardships, was constantly illustrated in the face of society by practical experience, equity held a different view. Equity regarded the *feme covert* as an individual personage, capable of having and retaining property after marriage, which ought in justice to re-

ceive protection, for her individual enjoyment; and, by virtue of the supremacy of the principles of equitable jurisprudence over the common law, equity found means to protect such rights in many, if not in all, cases, notwithstanding the rules of the common law. (Pomeroy's *Equity Jurisprudence*, §§ 53, 54, 159, 1098; Bispham's *Principles of Equity*, §§ 96-115; 2 Spence's *Equity Jurisdiction*, 503; *supra*, pp. 474-533, § 9.)

The course of legislation demonstrates that the doctrines of equity on this subject were approved by common sentiment. Legislation has from time to time swept away at least some of the dogmas of the common law on this subject. See digest of statutory enactments on this subject in various states, collected in note to *Kirkpatrick v. Buford*, 76 Am. Dec. 366. The legislature of Montana moved in this direction by declaring that "women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and, for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone." (Comp. Stats., div. 5, § 1439.)

This is a comprehensive provision, and commands the courts in this jurisdiction, where a united jurisprudence of equity and law is administered, to disregard the ancient doctrine of the common law on the question under consideration as a dead dogma, and enforce and protect the rights of married women unhampered thereby; and we think the effect of this statute would be to so modify the prior act of 1872, above quoted, as to enable a married woman to hold her individual separate property as against her husband's creditors without having a list thereof on record, on showing the facts necessary to establish her individual title thereto.

The judgment of the trial court is therefore affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

**DURFEE, RESPONDENT, v. GRANITE MOUNTAIN
MINING COMPANY, APPELLANT.**

[Argued March 27, 1893. Decided May 15, 1893.]

Costs—Action for creating nuisance.—An action for damages for injury to land caused by the contamination of a stream, by the mixture of deleterious substances therein which were deposited upon plaintiff's land and destroyed the vegetation, is not an action for trespass, but for creating and maintaining a nuisance, and therefore in such case, where a verdict for one dollar is returned, it is error for the court to tax the costs against the defendant under the Act of March 14, 1889 (*Laws*, 2d Sess., p. 120), allowing costs in actions of trespass without respect to the amount of damages recovered, as the case is controlled by sections 495 and 498 of the Code of Civil Procedure, providing that no costs shall be allowed in an action for the recovery of money or damages when the plaintiff recovers less than fifty dollars.

Appeal from Third Judicial District, Deer Lodge County.

Action for damages for creating a nuisance. The cause was tried before McHATTON, J. Verdict for plaintiff for one dollar, for which with costs judgment was rendered. Reversed as to costs.

Forbis & Forbis, and H. F. Titus, for Appellant.

Cole & Whitehill, for Respondent.

PEMBERTON, C. J. This action was brought to recover damages from appellant, who was defendant below, for the alleged contamination of the waters of Fred Burr creek, in Deer Lodge county, by the mixture of deleterious substances therein, as well as the placing of debris in said creek, which respondent alleges flowed down said creek and through his irrigating ditches, and came upon said farming lands, depositing sediment thereon, destroying the vegetation, and rendering said lands unfit for agricultural purposes, and rendering said water unfit for domestic and other purposes. It was further sought to permanently enjoin appellant from placing in said stream the injurious matter aforesaid. Defense was made and trial ensued, resulting in special findings by the jury, as follows: "1. Does the water flowing from Fred Burr creek in the ditch of the plaintiff during the irrigation season contain chloride of sodium, or common salt, in excess of what is usually found in water? If so, how many grains per gallon? Fifty grains.

2. Does the water flowing in plaintiff's ditch during the irrigation season contain more sulphate of soda than is usual for water to contain? If so, how many grains per gallon? Twenty grains. 3. Does the water flowing in the plaintiff's ditch contain sulphate of zinc in sufficient quantities to be deleterious to vegetable or animal life? No." The jury also found a general verdict for damages in the sum of one dollar, which findings were adopted by the court, and supplemented by further findings by the court, as follows: "1. The court adopts as its findings of fact the verdict of the jury, and the special findings made by the jury in this case; 2. That in the year 1889 the defendant constructed its quartz-mill on Fred Burr creek, and commenced using the waters of the said creek for milling purposes, and ever since such time has so used said waters; 3. That the said mill, as operated by the defendant at the present time, consists of one hundred stamps, which are used for the crushing of ore, which ore is reduced in connection therewith; 4. That all the tailings of defendant are cribbed in the vicinity of the mill, so that the same are not washed down upon the lands below, nor into the bed of the creek, and do not flow upon the land of the plaintiff, nor into his ditch; 5. That the waters of Fred Burr creek hold in solution small quantities of sodium, or common salt, and sulphate of sodium, or Glauber's salt; that the same are in such quantities as not to be injurious to vegetable or animal life to any appreciable extent, and that the same are not poisonous; 6. But that, by reason of the said salts held in solution, the lands of the plaintiff are not made unfit for cultivation or hay-farming to any appreciable extent, and that the value of the land of the plaintiff is not destroyed or depreciated on account thereof." Thereon judgment was pronounced in favor of plaintiff, to the effect that he have and recover from defendant the sum of one dollar damages, together with two hundred and forty-five dollars costs. Thereupon defendant appealed from the part of the judgment assessing the costs against it.

The contention involves the consideration of the following provisions of the statute: Section 495 of the Code of Civil Procedure (page 192) reads as follows: "Costs may be allowed, of course, to the plaintiff upon a judgment in his favor in the

district court in the following cases: 1. In an action to recover real property. 2. In an action to recover the possession of personal property when the value of the property amounts to fifty dollars or over, such value shall be determined by the jury, court, or referee by whom the action is tried. 3. In an action for the recovery of money or damages when the plaintiff recovers fifty dollars or over. 4. In special proceedings in the nature of an action."

SEC. 498: "In other actions than those mentioned in section 495 of this act, costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court; but no costs shall be allowed in an action begun in the district court for the recovery of money or damages when the plaintiff recovers less than fifty dollars, or in any action begun in the same court to recover possession of personal property when the value of the property is less than fifty dollars."

In 1889 the legislature passed an act, of which section one reads as follows: "SECTION 1. Costs shall be awarded by the district court to the plaintiff in an action to recover damages for trespass upon real property brought in that court, without respect to the amount of damages recovered." From a view of these statutes, it appears plainly that this case must be classified as an action "to recover damages for trespass upon real property," in order to warrant the taxation of the costs involved against defendant.

The only question involved is as to the right of the court below to tax the costs against appellant and render judgment therefor. The determination of this question imposes the duty upon this court to decide whether this is a case for creating and maintaining a nuisance, or for trespass. In Wood on Nuisances, 2d ed., § 13, "nuisance" is thus defined: "Nuisances arise, as has been heretofore stated, from a misuse of property, real or personal, or from a person's own improper conduct. But the idea of a nuisance, generally, is associated with, and more commonly arises from, the wrongful use of real property. It is only in special and infrequent instances that it arises otherwise, which will be referred to and fully explained *infra*. They are always injuries that result as

a consequence of an act done outside of the property injured, and are the indirect and remote effects of an act, rather than a direct and immediate consequence. It is a species of invasion of another's property by agencies operating entirely outside of the property itself, and imperceptible and invisible, except in the results produced, which are often even themselves not visible, and whose presence at times is only appreciable by one of the senses, and that, generally, not by the sense of seeing." In the same section, "trespass" is defined as follows: "A trespass is a direct and forcible invasion of one's property, producing a direct and immediate result, and consisting usually of a single act." In 1 Addison on Torts, § 217, and note thereto, containing citations to numerous authorities, the elements distinguishing trespass from nuisances are fully stated and discussed. It cannot be pretended that the findings of fact by the jury or court in this case show "a direct and forcible invasion," or any invasion, of respondent's property by appellant. Whatever wrong or injury respondent has sustained has been the result of the wrongful use by the appellant of its own property, and falls within that species of injuries contained in the definition of nuisances, as quoted above. From a consideration of the findings of fact in this case, and the authorities, we are of the opinion that this is an action for damages for creating a nuisance, and not for the commission of a trespass upon the real property of the respondent. And so holding, we are of the opinion that that part of the judgment of the court below requiring the appellant to pay the costs of suit was error. That part of the judgment taxing the costs to appellant is reversed.

HARWOOD and DE WITT, JJ., concur.

Reversed in part.

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PALMER, RESPONDENT, v. McMaster, APPELLANT.

[Argued June 21, 1892. Decided May 15, 1893.]

SUMMONS—*Affidavit for publication—Judgments*.—An affidavit on which an order of publication of summons is made, which merely states that the defendant has departed from the state and cannot be found therein, without stating that due or any diligence had been used to ascertain his whereabouts, or that any effort had been made to obtain personal service, and no reason is given for not stating his residence, is insufficient to authorize the issuance of the order, and a judgment taken in such case is void.

SAME—Same.—It is not sufficient to state, in an affidavit for the publication of a summons, that the defendant has departed from the state, or cannot after due diligence be found within the state, following the language of the statute, but the probatory facts constituting the diligence of the plaintiff to find the defendant should be stated in order to enable the court to judicially determine the ultimate fact that due diligence was exercised.

Appeal from Third Judicial District, Deer Lodge County.

Conversion. Judgment was rendered for the plaintiff below by DURFEE, J. Affirmed.

Brantley & Scharnikow, and W. H. Trippett, for Appellant.

The objection to the judgment was wholly as to the sufficiency of the affidavit for publication of summons. If the affidavit is good, assuming that it can be considered on a collateral attack, then there is a good judgment; if bad, then an invalid judgment. The objection which the lower court found to this affidavit was that it did not state where the residence of defendant was, or, in lieu thereof, that his residence was unknown; citing *Ligare v. California S. R. R. Co.*, 76 Cal. 610, and *Ricketson v. Richardson*, 26 Cal. 153. In both these cases there was a direct and not a collateral attack upon the judgment. The affidavit was drawn under the Act of 1883. That act in its language is quite different from the statute of California and from our statute of 1879. The first section of the statute of 1883, after stating the causes for publication, reads, "and an affidavit stating any of these facts is filed with the court," etc., then publication shall be made. That is to say, if any of these facts are stated it will be sufficient, adding the other matter required by that section. In other words, everything required to be stated in the affidavit is prescribed in the first section of the Act of 1883, and there is nothing by construction required by the second section. There being, therefore, no express or constructive requirement under the statute of 1883 that the residence of the defendant should be stated, or that the residence was unknown, the affidavit is sufficient upon that point. The affidavit is certainly good as to any other objection. The statement that the defendant is a nonresident of the territory, or has departed from the terri-

tory, is a fact in itself, without any further evidential fact. (*Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Furnish v. Mullan*, 76 Cal. 646.) The affidavit for publication is no part of the judgment-roll. True, in the case of *Alderson v. Marshall*, 7 Mont. 288, a collateral attack was allowed to be made upon a judgment of this kind, but there the court seems to have assumed that the affidavit was a part of the judgment-roll. In assuming that the affidavit was a part of the judgment-roll and allowing the judgment to be collaterally attacked on account of a defective affidavit, the decision in *Alderson v. Marshall* is squarely in conflict with the following cases: *Sharp v. Daughney*, 33 Cal. 505; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *Quivey v. Porter*, 37 Cal. 458; *McCauley v. Fullon*, 44 Cal. 356, and *In re Newman*, 75 Cal. 213; 7 Am. St. Rep. 146.

Cole & Whitehill, for Respondent.

The authorities are abundant on the proposition that a judgment is void when founded upon an insufficient affidavit and it has been so decided in this state. (*Alderson v. Marshall*, 7 Mont. 288; *Palmer v. McMaster*, 8 Mont. 186.) It is the law of this case, even if the court should now hold it wrong in principle. The affidavit of publication is bad under all the authorities, and an affidavit of that kind cannot support an order, and if that be so the judgment is void. The bald statement that the defendant has departed is not enough. It must be shown that he has not only departed, but has gone to some other jurisdiction, or that from inquiry his whereabouts cannot be ascertained. Even in the case of a nonresident it is not sufficient to say that defendant is not a resident of the state, but his present residence must be stated, or some satisfactory reason for not stating that fact must be given. There is not an authority in all the books that holds that merely stating nonresidence is sufficient. The cases cited by counsel, *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, and *Furnish v. Mullan*, 76 Cal. 646, do not decide that "the statement in the affidavit that the defendant is a nonresident of the territory is sufficient"; on the contrary, in the words of the judge who wrote the opinion in the first case, these cases both hold that "where a defendant

is shown to be a resident of another state, and his place of residence is known, it is not necessary to show diligence in finding him," etc. That is the correct rule and is the law of Montana. (*Alderson v. Marshall*, 7 Mont. 288; *Forbes v. Hyde*, 31 Cal. 342; *Galpin v. Page*, 19 Wall. 350; 3 Saw. 93; *Neff v. Pennoyer*, 3 Saw. 274; *McDonald v. Cooper*, 32 Fed. Rep. 745; *McCracken v. Flanagan*, 127 N. Y. 493; 24 Am. St. Rep. 481; *Braly v. Seamen*, 30 Cal. 610; 1 Black on Judgments, §§ 232, 281; *Little v. Currie*, 5 Nev. 90; *Belcher v. Chambers*, 53 Cal. 635.)

PEMBERTON, C. J.—This case has been several times before this court on appeal (8 Mont. 186, and 10 Mont. 390), and the errors assigned in the record on this appeal have nearly or quite all been passed upon in the former appeals of the case. It is a case for damages for the conversion of certain personal property, described in the complaint of respondent, who was plaintiff in the court below. The appellant, the defendant below, was, at the time of the conversion complained of, sheriff of Deer Lodge county, and, among other defenses set up in his answer, sought to justify the seizure of the property claimed to have been converted under an execution in his hands, issued out of the court below, upon a judgment rendered in said court against one William J. Palmer, husband of the respondent.

The action against the said William J. Palmer was commenced by publication of summons. The affidavit on which the order of publication of summons was made by the court below is as follows: James M. Bailey, being duly sworn, says on oath he is the plaintiff above named. That the above-entitled cause has been begun, and summons has been issued thereon, and is now pending in said court. That said defendant has departed from this territory, and cannot be found therein. That plaintiff has a good and subsisting cause of action against the defendant in this: that said defendant is indebted to plaintiff as follows: That on the 10th day of March, 1880, defendant executed to plaintiff and one Hartwell his promissory note for \$113, payable six months from date, with 1½ per cent per month interest, which defendant has failed to pay, and said note was assigned to plaintiff. And for second cause of action

said plaintiff sold to defendant in May, 1883, 8,265 pounds of oats, which defendant agreed to pay plaintiff therefor the sum of three cents per pound—\$247.95. And plaintiff sold to defendant two horses, of the value of \$200, which defendant agreed to pay plaintiff; all of which more fully appears by plaintiff's complaint on file in said cause. James M. Bailey."

The suit of James M. Bailey *versus* William J. Palmer was prosecuted to judgment. In the trial of the case at bar below, the appellant offered in evidence, in justification of his seizure of the property converted, the judgment in the case of *Bailey v. Palmer*. The court excluded the evidence on the ground that the affidavit for an order of publication of summons, quoted above, was not sufficient to authorize or support such order of publication, and that the judgment rendered thereon in favor of Bailey was void. This ruling of the court is the principal error assigned in this case.

This court held in *Palmer v. McMaster*, 8 Mont. 186, and *Alderson v. Marshall*, 7 Mont. 288, that a proper and sufficient affidavit for an order of publication in cases of constructive service of summons is a prerequisite to a valid judgment. The question before this court is as to the sufficiency of this affidavit. It is the settled doctrine "that the statutory provisions for acquiring jurisdiction of a defendant by the publication of the summons in the stead of a personal service must be strictly and exactly" complied with by stating in the affidavit for the order of publication the probatory facts by which the ultimate facts which the statute calls for are shown. (1 Black on Judgments, § 232.)

In *Ricketson v. Richardson*, 26 Cal. 149, the court says: "An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably, the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts

upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the facts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered." In *Forbes v. Hyde*, 31 Cal. 342, *Ricketson v. Richardson* is affirmed in an elaborate opinion by Mr. Justice Sawyer.

In *McCracken v. Flanagan*, 127 N. Y. 493, 24 Am. St. Rep. 481, this question is elaborately discussed, and authorities cited. In this case the court says: "It is, from an examination of this statute, pretty evident that some degree of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and that the simple averments in the affidavit that the defendant is a nonresident, and cannot be found within the state, are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that, the defendant cannot be found in the state, does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence. Hence, the statute forbids that due diligence may be implied from the statement that the defendant cannot be found within the state." (See

also, *Galpin v. Page*, 3 Saw. 93; *Braly v. Seaman*, 30 Cal. 611; *Belcher v. Chambers*, 53 Cal. 637; *Alderson v. Marshall*, 7 Mont. 288; *Palmer v. McMaster*, 8 Mont. 186.)

The affidavit in the case at bar does not state that due or any diligence had been used to ascertain the whereabouts of the defendant, or that any effort had been made to obtain personal service of summons upon him. His residence is not stated, or any reason given for not stating it. There is not a probatory fact stated in the affidavit. It is an attempt to state the words of the statute, without stating any probatory facts that would enable the court to judicially determine whether or not it was sufficient to authorize the issuance of the order for publication of summons. In view of the authorities quoted and cited above, we are of the opinion that the affidavit in question was insufficient in law to support an order of publication of summons, and that the judgment of *Bailey v. Palmer* was consequently null and void, and was properly excluded as evidence in this case by the court below. The judgment of the court below is affirmed.

Affirmed.

HARWOOD, J., concurs. Dr. WITT, J., having been of counsel, did not sit.

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LEGGAT, RESPONDENT, v. LEGGAT, APPELLANT.

[Argued February 17, 1893. Decided, May 15, 1893.]

JURORS—*Challenge*.—In an equity case where the findings of the jury are advisory, error, if any, in not sustaining a challenge to a juror, is immaterial where the findings were adopted and are not attacked on appeal.

LIS PENDENS—*Notice of, when admissible*.—A notice of lis pendens filed on the commencement of an action to compel the reconveyance of land is admissible on the trial for the purpose of framing a decree should the plaintiff prevail.

FRAUD IN PROCURING CONVEYANCE OF LAND—*Evidence*.—In an action to compel a reconveyance of land, alleged to have been procured through fraud, testimony to the effect that defendant, who was the attorney in fact of plaintiff and in a fiduciary relation to her, could have realized more for her land by selling the lots separately than by selling them all together, is admissible, particularly where it was conceded that the price paid by defendant was not a fair or just price.

SAME—*Evidence*.—In such action evidence tending to show the value of the land at the time of the trial, which was three years after the conveyance to defendant, was properly excluded.

SAME—Evidence.—In such action, testimony as to the value of the land several years before the transaction between plaintiff and defendant, and that it had not depreciated is admissible upon the question of the value of the land at the time of such transaction.

SAME—Accounting for Profits—Evidence.—In such action, where an accounting for profits is sought, the considerations named in certain deeds made by the defendant after obtaining the property may be properly read in evidence, for, while the price named in a deed is not conclusive, it is at least *prima facie* evidence tending to show what the consideration was.

SAME—Testimony in Rebuttal—Discretion.—Where a certain portion of the premises had been mentioned by defendant, it was a matter of discretion with the trial court to permit plaintiff to show the value of such premises in rebuttal, and, where no injury results the action of the court will not be held error.

Appeal from Second Judicial District, Silver Bow County.

Action to compel reconveyance of land and for an accounting for profits. The cause was tried before McHATTON, J. Plaintiff had judgment below. Affirmed.

Statement of facts, prepared by the judge delivering the opinion.

This action was brought by plaintiff to compel the reconveyance of real estate from defendant to her, alleged to have been obtained from plaintiff by fraud, also for an accounting for profits realized by defendant in sales of portions of the premises. The plaintiff alleges in her complaint that she is a resident of the state of Missouri; that prior to March 19, 1888, she was the owner of an undivided one-third of the Leggat & Foster addition to the city of Butte, Silver Bow county, Mont.; that on December 15, 1887, she executed to defendant her power of attorney, constituting defendant her attorney to manage and sell plaintiff's property in Silver Bow county, Montana; that defendant accepted said trust, and acted as her attorney until her revocation of that power December 27, 1888; that defendant is the brother-in-law of the plaintiff—brother of her deceased husband—and that she placed confidence in his friendship, integrity, and honor; that on March 19, 1888, the defendant fraudulently procured from plaintiff a deed of said one-third of the Leggat & Foster addition. The complaint sets up in detail the acts which plaintiff claims were fraudulent. Among those acts it is alleged that defendant telegraphed to James G. Butler, of St. Louis, who is a friend of the plaintiff, as follows: "Will Frauk [meaning plaintiff]

take two thousand dollars for his [meaning her] interest in the Leggat & Foster addition? [Signed] R. D. Leggat." Plaintiff caused an answer to be telegraphed: "Yes, if you advise it; otherwise, no." This was on the 6th and 7th of March, 1888. The consideration is alleged to be grossly inadequate. It is alleged that about this time the defendant, being attorney in fact of plaintiff, was offered by another person \$3,000 for her said one-third of the property. It is also alleged that just about the same time another one-third was actually sold for \$3,000, and that defendant knew this fact, and did not communicate it to plaintiff; also that defendant knew the value of the property, and concealed the same from plaintiff; that by reason of defendant's false representations and advice, which plaintiff believed and relied upon, and on account of the concealment of facts, plaintiff executed and delivered to defendant a deed of the one-third interest for \$2,000. It is further alleged that since defendant received the deed he has received as his share from the sale of lots the sum of \$2,390, and that many more lots remain unsold.

Plaintiff tendered—and made good in court her tender—the original consideration, with interest and the cost of making a deed. She alleges that the one-third value of the lots remaining unsold is five or six thousand dollars. She demands a reconveyance and an accounting. An answer was filed, which denied all the alleged equities of plaintiff. The case was tried by the court, with a jury. No special verdict was found, but elaborate special findings were made by the jury. In view of the alleged errors which are to be considered in deciding the case, it is unnecessary to recite these findings. It is sufficient to note that the jury fully and completely found facts for the plaintiff sufficient to entitle her to a judgment. Neither the sufficiency of the findings, nor the evidence to support them, is now attacked. The court, upon motion, adopted the findings of the jury, and rendered judgment. A notice of *lis pendens* had been filed at the commencement of the action. The judgment of the court protects *bona fide* purchasers from the defendant during the period between the giving of the deed by plaintiff to defendant and the filing of the notice of *lis pendens*. The judgment then requires a reconveyance to plaintiff of the

lots remaining unsold. It also takes into account the amount of money tendered by plaintiff to defendant, and renders judgment against defendant for the further sum of \$1,400 over and above the amount of the tender; that is, plaintiff was allowed to withdraw her tender, and take judgment for \$1,400, the sum of those two amounts being what was found due on the account. The defendant moved for a new trial, which was denied, and from that order, and the judgment, he appeals. There were no specifications that the findings were not supported by the evidence, and counsel for appellant, upon the argument, concedes that no attack is made upon the findings. The appeal is made solely upon alleged errors of law, which are set forth as they are discussed in the opinion below.

Robinson & Stapleton, for Appellant.

Wm. Scallon, for Respondent.

DE WITT, J. The appellant contends that his challenge for cause to juror Heilig should have been sustained. But, if this were error, it is not now material, because the findings were advisory, and were adopted by the court, and are not now attacked.

Appellant claims that it was error to allow the introduction in evidence of the notice of *lis pendens* filed by plaintiff. The notice was objected to as immaterial and irrelevant. But we are of opinion that, as counsel said when offering the notice, it was material for the purpose of framing the decree if judgment should, as it did, go for plaintiff. There were many lots sold by defendant between the date of the deed by plaintiff to him and the date of the commencement of this action.

The appellant also contends that the court erred in allowing witness Cobban to testify that more could have been realized by selling the lots separately than by selling them altogether. But the defendant was the attorney in fact of plaintiff, and was in a fiduciary relation to her. He was under a duty to do the best he could for plaintiff. The testimony of Cobban simply tended to the effect that the trustee could have done better than he did for his *cestui que trust*. We are of opinion that there was no error in admitting this testimony. This evidence was pointed at the value of the property. Even if such admission

should be considered error, it would not be error upon which the case could be reversed, for it is conceded, by virtue of the facts, that appellant does not attack the findings that the property was of a greater value than that paid by appellant to respondent, and that the price that he paid was not a fair and just price.

The appellant claims that it was error to exclude the following question asked by him of witness Cobban: "Is it a fact that no money can be borrowed on any of the property in the Leggat and Foster addition outside of what is in the Belmont? That the banks won't loan a dollar on it, and men won't loan money on it, for the reason that the title is in conflict"? This case was tried on the 10th of July 1891. The defendant received his deed from plaintiff March 19, 1888. Therefore the question before the court was not the salable value of the property at the time of the trial, some two years after the time the defendant obtained the deed of the property. It is observed that the question excluded was as to the value of the property at the time of the trial, and that evidence was properly excluded.

It was also objected that the testimony of J. H. Harper was improper, in that he testified as to the purchase of lots in the Leggat and Foster addition in 1881, and the value of the lots. But the witness also testified that there had been no depreciation in the value since 1881. His testimony was therefore to the effect that the value at the time of the transaction between plaintiff and defendant was at least as great as it was in 1881.

Charles F. Booth, county clerk and recorder, was a witness. He was testifying from the county records as to the deeds made by defendant for lots which he had sold after he had acquired the title, in March, 1888. As the witness testified from the records as to these lots by their description and dates, he also mentioned the considerations named in the deeds. The defendant objected to the prices of the lots being given, in that the prices mentioned in the deeds were not the measure of damages. It is quite true that the considerations named in the deeds are not at all conclusive. But such consideration was a statement over the signature of defendant, and, we are of opinion, was at least *prima facie* evidence, with some slight

tendency to show what was the consideration. Whatever *prima facie* tendency there was in this testimony could easily have been rebutted if the facts were otherwise.

Charles S. Warren was a witness. In rebuttal he was testifying in regard to some lots in the addition which had been sold to Sargeant. It was not objected that this testimony was incompetent, but that it was not proper to be given in rebuttal. But the Sargeant sale had been mentioned by defendant, and we are of opinion that the matter of allowing plaintiff in rebuttal to introduce what Warren said as to the value of the premises was a matter of discretion with the lower court, and no injury suggests itself as resulting from the action of the court.

The foregoing are the alleged errors which appellant has presented for our consideration. We are of opinion that none of these points are well taken, and that the judgment must therefore be affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

JOSEPHI ET AL., RESPONDENTS, v. MADY CLOTHING COMPANY, APPELLANT.

[Argued February 17, 1893. Decided, May 22, 1893.]

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ATTACHMENT—Affidavit—Amendment.—An affidavit for attachment setting forth in the language of the statute a fraudulent disposition by defendant of its property as ground for attachment before the maturity of the debt, may be amended on the trial by setting out the facts constituting the alleged fraud.

EVIDENCE—Declarations.—Where a large indebtedness by a defendant company to one of its trustees, existing after the company had been in business but a few months, is sought to be proved fraudulent, a declaration by such trustee to a third party made at the time the company was incorporated, that the company had started with a clean balance sheet, is admissible.

VERDICT—Sufficiency.—A verdict in favor of plaintiff is sufficient without stating the amount awarded, where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due.

ESTOPPEL BY JUDGMENT.—An estoppel by judgment, to be available as a bar, must be pleaded.

Appeal from First Judicial District, Lewis and Clarke County.

Action upon an account. The cause was tried before BUCK and HUNT, JJ., sitting concurrently. Plaintiffs had judgment below. Affirmed.

Statement of the case prepared by the judge delivering the opinion.

The plaintiffs brought this action to recover judgment for one thousand two hundred and eighty-three dollars and fifty cents, on account of goods sold and delivered to defendant, a corporation. There was an unexpired credit upon the account. The plaintiffs brought the action under the following provision of section 183 of the Code of Civil Procedure: "Actions may be commenced and writs of attachment issued upon any debt for the payment of money or specific property, before the same shall have become due, when it shall appear by the affidavit." The section then goes on to provide what shall appear by the affidavit, in order that the attachment may issue. The complaint pleads the indebtedness and the unexpired credit, and then alleges, in sections 3-5, substantially as follows: That defendant is endeavoring to, and is about to, dispose of all its property subject to execution, for the purpose of defrauding its creditors; that is, defendant, by its officers, has entered into a collusive agreement with Reinhold H. Kleinschmidt and Albert Kleinschmidt, whereby it is pretended that defendant is indebted to said Kleinschmidts in the sum of thirteen thousand six hundred and thirteen dollars and thirty-seven cents, upon an alleged promissory note of defendant to said Kleinschmidts, of the date of October 2, 1890; that if said note were made, it was without consideration, nor was said defendant at all indebted to said Kleinschmidts, but the note was made for the purpose of enabling the Kleinschmidts to attach the property of defendant, and to take the same from the reach of the creditors of defendant, and to delay them in the collection of their debts; that in pursuance to such design, and in collusion with defendant, said Kleinschmidts, on October 15, 1890, procured an attachment against defendant, and levied upon all its property. The affidavit upon attachment in the case at bar, in addition to the matter required to be set out in an affidavit upon attachment for a debt due, contained the following statement: "That the same [that is, the indebtedness] is not yet due, but that defendant is endeavoring to, and is about to, dispose of all its property subject to execution to Reinhold H. Kleinschmidt and Albert Kleinschmidt, for the

purpose of defrauding its creditors, and that the payment is not secured by any mortgage, lien, or pledge upon real or personal property." A trial by jury resulted in a verdict for plaintiffs. Judgment was entered for the amount claimed. Defendant's motion for a new trial was denied. From that order and the judgment defendant now appeals. The alleged errors relied upon are stated as they are discussed in the opinion below.

Henry C. Smith, and Cullen, Sanders & Shelton, for Appellant.

I. The court erred in permitting the plaintiffs to amend the affidavit on attachment at the trial. The debt was not due at the time of the commencement of this action, and the only warrant for the commencement of a suit at law and the issuance of a writ of attachment before the maturity of the debt is statutory. (Comp. Stats., § 183, p. 104.) The affidavit is jurisdictional. If there is no affidavit—and a defective affidavit is the same as no affidavit—no action has been commenced. There is a marked distinction between the amendment of an affidavit in attachment, when the debt is due at the commencement of the suit, and the amendment of the affidavit, when the debt is not due. In the first place, there is a suit in court of which the court can take cognizance; but in the latter case, unless the affidavit required by statute is first filed, there is no suit whatever, and the court could acquire no jurisdiction by subsequent amendment if it had none in the first instance. (*Ernstein v. Rothschild*, 22 Fed. Rep. 61.) That the original affidavit was ineffectual and void was confessed by plaintiffs at the trial by the amendment. (*Railway Co. v. McCarty*, 96 U. S. 267.) Consequently the court had no jurisdiction of the case, and could not give vitality to an action which had never been commenced. (1 Waples on Attachment, pp. 76-79; 1 Wade on Attachment, 24, 72, 161-63; *Gowan v. Hanson*, 55 Wis. 341; *Straughan v. Hallwood*, 30 W. Va. 274; 8 Am. St. Rep. 29; *Livey v. Winton*, 30 W. Va. 554; *Pope v. Hibernia Ins. Co.*, 24 Ohio St. 485; *Brown v. Galena Mining Co.*, 32 Kan. 528; *Goodyear Rubber Co. v. Knapp*, 61 Wis. 103; Drake on Attachment, sec. 87, note and authorities cited;

Landis v. Morrissey, 69 Cal. 83; *Richards v. Brice*, 13 N. Y. 728; *Hunneman v. Grafton*, 10 Met. 454; *Morrison v. Clark*, 7 Cush. 213; *Wilder v. Colby*, 134 Mass. 377; *Manton v. Gannon*, 7 Bradw. 201.)

II. The plaintiffs having introduced the judgment-roll in the case of *Kleinschmidt v. Mady Clothing Co.*, in which they appeared as intervenors, were concluded by the judgment in that case. It seems to be apparent that when the plaintiffs in this case intervened in the other case, and permitted judgment to be rendered against them, and took no steps to appeal or test the validity of that judgment in any manner whatever, that they were effectually estopped from again litigating the same questions in this action. (*Rudolf v. McDonald*, 6 Neb. 163; 2 Black on Judgments, §§ 576, 784; *Gray v. Pingry*, 17 Vt. 419; 44 Am. Dec. 345-47; *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Isaacs v. Clark*, 12 Vt. 692; 36 Am. Dec. 372; *Gumbel v. Pilkin*, 113 U. S. 545; *Richardson v. Watson*, 23 Mo. 34; *Richardson v. Jones*, 16 Mo. 177; *Shelton v. Brown*, 22 La. Ann. 162; *Markham v. O'Conner*, 23 La. Ann. 688.)

III. The court erred in overruling defendant's objection to the testimony of the witness Gaines, in relation to his conversation with Kleinschmidt, for the reason that Kleinschmidt not being a party to this suit, his declarations would be inadmissible against any one except himself.

IV. The verdict did not comply with the statute, and would not support the judgment entered thereon. (Comp. Stats., §§ 276, 302, pp. 129, 138.)

H. G. McIntire, McConnell, Clayberg & Gunn, and F. N. & S. H. McIntire, for Respondents.

I. The amendment of the affidavit on attachment was asked and made to dispose of captious objections made on the trial. The original affidavit was amply sufficient. An inspection of it will disclose that the language of the statute, Compiled Statutes, page 104, section 183, is used. This is all that is necessary. The ground for attachment may be stated in the language of the statute without specifying more particularly the facts intended to be alleged. (*Tallon v. Ellison*, 3 Neb. 63; Drake on Attachments, 6th ed., §§ 103-103 b; *Wheeler v.*

Farmer, 38 Cal. 215; *Weaver v. Hayward*, 41 Cal. 117; *Coston v. Paige*, 9 Ohio St. 397.) But even if it were not so, wherever authorized by statute, an affidavit in attachment may be amended. Section 114 of the Montana Compiled Statutes is broad enough to permit such an amendment. (*Pierse v. Miles*, 5 Mont. 549; *Langstaff v. Miles*, 5 Mont. 554; *Magee v. Fogerty*, 6 Mont. 239.) In any event, however, insufficiencies in the affidavit are of no further moment. They are waived by not being objected to on motion to dissolve. (Comp. Stats., p. 109, sec. 200; *Wallace v. Lewis*, 9 Mont. 399; *Vaughn v. Dawes*, 7 Mont. 362; 7 Lawson's Rights and Remedies, §§ 3536, 3537.) Instead of moving to dissolve, appellant confessed the sufficiency of the affidavit by its plea to the same.

II. Respondents are in no wise concluded by the judgment in *Kleinschmidt v. Mady Clothing Company*. The merest inspection of the judgment-roll in that case will so show. Respondents intervened and could intervene in that case for one purpose only, to defer plaintiff's claim to theirs. (*Davis v. Eppinger*, 18 Cal. 379; 79 Am. Dec. 184; *Speyer v. Ihmels*, 21 Cal. 281; 81 Am. Dec. 157.)

III. It was not error to admit in evidence the conversation between Kleinschmidt and the witness Gaines. At the time of this conversation Kleinschmidt was a trustee of the corporation, and was making a statement of the concern to the representative of R. G. Dun & Co., a mercantile agency, for the purpose of giving it standing and credit in the commercial world. It is idle then to say that his statements are not admissible.

IV. The verdict is sufficient. It would be difficult to imagine what other form could have been used in this case. The statutes cited in appellant's brief are not applicable. (*Hutchinson v. Superior Court*, 61 Cal. 119.) But if the verdict were irregular, objection should have been made to it in the trial court. No such objection was made; it cannot now be raised. (*Douglass v. Kraft*, 9 Cal. 562; *Campbell v. Jones*, 41 Cal. 515.)

V. The goods were bought by the defendant with the design of not paying for them. The debt then became and

was equitably due on their delivery, and the suit was not prematurely brought. The case is within the doctrine of *Patrick v. Montader*, 13 Cal. 434.

DE WITT, J. Upon the trial of the case the defendant objected to the evidence in reference to the alleged fraudulent disposition of the property, upon the ground that the affidavit setting it forth was defective. The affidavit set forth the fraudulent intent in the language of the statute. The defendant's objection was that the affidavit states no facts within the statutory requirements. Thereupon the plaintiffs asked leave to amend their affidavit, which leave was granted by the court, and they then and there incorporated into the affidavit five paragraphs of the complaint, including paragraphs 3, 4, and 5, mentioned in the statement above, which paragraphs were a full setting forth of the acts which plaintiffs claimed showed the fraudulent intent of the defendant to dispose of its property. It is not contended by appellant that the affidavit as amended was insufficient, but it is now urged in this court that the original affidavit was jurisdictional, and that it was so defective that it was no affidavit, and the court never had jurisdiction of the case. Respondents contend that, even if the original affidavit were not sufficient, it was not error to allow the amendment. This case is not like those cases wherein there was no affidavit at all. There was an affidavit here, which set out the facts in the language of the statute. The complaint is that they were not sufficiently stated. Passing the question of whether the affidavit was originally sufficient, we feel satisfied that the tendency of the decisions of this court is that such an affidavit may be amended. (*Pierse v. Miles*, 5 Mont. 549; *Langstaff v. Miles*, 5 Mont. 554; *Magee v. Fogerty*, 6 Mont. 237.) In the last case, Chief Justice Wade, in the opinion, said: "The procuring of an attachment, and the steps necessary therefor, is a proceeding within the spirit and meaning of the one hundred and fourteenth section [section 116] of the Code of Civil Procedure; and if such proceeding is defective, the same may be amended, in the furtherance of justice, like any other proceeding under that section."

As to the estoppel suggested by appellant by reason of the

judgment in the case of *Kleinschmidt & Brother v. Mady Clothing Company*, I concur in the result reached in the other opinion filed in this case.

Another error claimed is as follows: A witness, Gaines, was upon the stand. He says that in 1890 he was the agent of the commercial reporting association of R. G. Dun & Co. He was asked this question: "Tell us what your conversation was with Mr. Kleinschmidt, in May, 1890, in reference to the Mady Clothing Company?" The defendant objected, on the ground that Kleinschmidt was not a party to the action, and the declarations made by him are not material to bind any one connected with the parties, or the parties themselves. The objection was overruled, and the witness testified that Kleinschmidt had told him, about May 3, 1890, that the capital stock of defendant was \$15,000; that he held \$10,000, and Mady \$5,000; and that the company had started with a clean balance sheet. The company was incorporated May 1, 1890. It appears that Kleinschmidt was a trustee of defendant, and a stockholder to the extent of two-thirds of the stock. A contention of the action was that defendant was disposing of its goods with the intent to defraud its creditors, and disposing of them to this same Albert Kleinschmidt and another. It was being contended that about the commencement of the action there was a large alleged indebtedness from the defendant to said Albert Kleinschmidt and another. The plaintiffs were claiming that this large indebtedness was a fraudulent one, and the defendant was disposing of its goods, or allowing its goods to be taken by said Kleinschmidts, on account of said alleged fraudulent indebtedness. Now, under this condition of affairs, a large fraudulent indebtedness being claimed to exist in October, we are of opinion that it was not error to allow the witness to testify that Albert Kleinschmidt had told him on May 3d that the Mady Clothing Company had started with a clean balance sheet on May 1st, when the plaintiffs were claiming and undertaking to prove that the company had a decidedly unclean balance sheet the October following.

There is one more matter presented by appellant. The verdict of the jury was as follows: "We, the jury in the above-entitled case, do hereby find in favor of plaintiffs." The ap-

pellant objects that this verdict does not comply with the statute (Code Civ. Proc., § 276), in that it does not state the amount awarded plaintiffs. But our statute provides, in section 271, of the Code of Civil Procedure, that "if the verdict be informal or insufficient in not covering the whole issue or issues submitted, or in any particular, the verdict may be corrected by the jury, under the advice of the court, or the jury may be again sent out." Under this provision the verdict could have been made more formal if it were necessary; but appellant, at the time of its rendition, made no application to that effect, nor did he make any objection to the verdict on motion for new trial. (*Douglass v. Kraft*, 9 Cal. 562.) But we are of opinion that, as a matter of fact, the verdict is not objectionable. There was no issue in the pleadings as to the amount due plaintiffs. The complaint sets up the claim for \$1,283.50, and the answer does not deny the indebtedness, nor the amount thereof. The only denial was to the effect that the amount was not yet due; that is, that the allegations of fraud by which it was sought to show that the debt should be considered as due were not true. Therefore, as far as the amount was concerned, it was admitted by the pleadings. (*Hutchinson v. Superior Court*, 61 Cal. 119.) Therefore, when the jury found their verdict simply to the effect that it was for plaintiffs, they found, in effect, for the plaintiffs on the issue in controversy; that is, the issue of fraud, which made the debt then due. We are of opinion that this is just such a form of general verdict as was suitable to the issues. Judgment was thereupon entered for the amount admitted to be due, namely, \$1,283.50.

The points above discussed are those presented in the briefs and arguments. None of them, we are of opinion, should be sustained. The judgment is therefore affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD J. (concurring). The principal assignment of error is pointed to the ruling of the trial court in permitting respondents to amend their affidavit for attachment. We conclude from a review of all the authorities cited by both appellant and respondents, and such

others as we have been able to examine, that the ruling of the trial court permitting plaintiffs to amend the affidavit for attachment should be sustained. (*Tilton v. Cofield*, 93 U. S. 163, and cases cited; *Erstein v. Rothschild*, 22 Fed. Rep. 61.) These cases contain a very able and conservative treatment of this question. (See also, *Coston v. Paige*, 9 Ohio St. 397; *Wheeler v. Farmer*, 38 Cal. 203.) In our opinion, the statute of this state authorizing amendment of pleadings or proceedings in civil actions (Code Civ. Proc., §§ 112-19) contemplates such affidavit as one of the proceedings in working out the remedial rights of a party, and that an amendment of the nature offered in this case should be permitted, especially where the court has acquired jurisdiction of defendant by personal service, and he is present, defending, as in the case at bar. The amendment in this instance was in relation to pleadable and controvertible facts (Code Civ. Proc., § 183) on which was predicated the right to an attachment process prior to the maturity of the debt sued on. Of course, in permitting an amendment of the affidavit by incorporating therein averment of facts for the first time, by which the other party might be taken by surprise, the court should grant such party proper time to controvert, and prepare to defend against such allegations. But in the case at bar defendant could not have been surprised or prejudiced by the amendment of the affidavit, inasmuch as the facts inserted therein by amendment had already been alleged in the complaint.

The assignment of error on the admission of the testimony of Gaines, to the effect that on or about May preceding the transaction in question, which was alleged to have taken place in October, Kleinschmidt stated to witness that defendant the Mady Clothing Company had commenced business "with a clean balance sheet," cannot be sustained. Kleinschmidt is alleged in the complaint to have been a party to the alleged fraudulent scheme set forth, whereby the company was disposing of its effects for the purpose of hindering, delaying, and defrauding its creditors; and prior to the admission of said testimony, it was shown that, when the alleged conversation occurred, Kleinschmidt was an officer and stockholder in defendant the Mady Clothing Company. The objection was that the state-

ment made in that regard, and under the circumstances shown by Kleinschmidt, could not bind the defendant corporation. This is no doubt true; nor was the said testimony introduced for any such purpose. The testimony in question was evidently introduced to show the conditions as to indebtedness existing between said company and Kleinschmidt, in May, according to the statement of Kleinschmidt, who afterwards asserted a large indebtedness against said company, which plaintiffs had alleged was a fraudulent and fictitious claim, asserted through collusion of said company with Kleinschmidt; which claim was made the basis of seizure of the company's goods. We think said testimony objected to was admissible.

The point raised by appellant to the effect that plaintiffs were barred by a former adjudication from showing the fraud set up in this action to justify the issuance of attachment process prior to the maturity of the debt sued on is untenable, because no such bar (if the facts supporting it existed) was pleaded by defendant. The answer "put in issue the matter alleged in the affidavit" (Code Civ. Proc., § 183) to support such attachment, but in no manner pleaded any other adjudication or judgment in bar. (Code Civ. Proc., § 103; Bliss on Code Pleading, § 303; 1 Estee on Code Pleading and Practice, § 328; 2 Estee on Code Pleading and Practice, §§ 3267-70, and cases cited; Boone on Code Pleading, § 161.)

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STORY ET AL., RESPONDENTS, v. CORDELL ET AL.,
APPELLANTS.

33-455

13	204
33	455
33	466

[Argued January 25, 1893. Decided May 22, 1893.]

SALES OF PERSONALTY—*Chattel mortgage—Bill of sale.*—A bill of sale of personal property, absolute on its face, which is accompanied by an agreement that if the debt for which it was given be paid within a stated period the bill of sale should be canceled, is in effect a chattel mortgage, and, not being accompanied by an affidavit of good faith as required by section 1538, fifth division of the Compiled Statutes, where mortgaged chattels remain in the possession of the mortgagor, or acknowledged and filed, is void as against third parties.

SAME—*Delivery.*—The marking of barrels of whisky with a cross and the vendee's name and removing them from the back of a store, and placing them in the center of the room, is not a sufficient delivery of possession as to third parties.

Appeal from Second Judicial District, Silver Bow County.

Claim and delivery. The case was tried before McHATTON, J., without a jury. Plaintiffs had judgment below. Reversed.

Statement of facts prepared by the judge delivering the opinion:

This action is in replevin for the recovery of certain barrels of whisky. The plaintiffs are creditors of defendant Cordell. Defendant Sutton is the assignee for the benefit of the creditors of said Cordell. The plaintiffs, as creditors of Cordell, about the twenty-first day of November, 1889, went to him for a settlement of their account. Cordell was a merchant in Walkerville, Silver Bow county. By reason of his indebtedness to the plaintiffs he turned over to them the barrels of whisky which are the subject of this action. The facts of this "turning over of the whisky," as the witnesses call it, were as follows: The whisky was in the warehouse of defendant Cordell. When the managing agent of the plaintiffs went to Cordell to collect the account, Cordell gave to the plaintiffs a bill of sale of the whisky. This bill of sale was absolute on its face. But accompanying the bill of sale was an agreement between Cordell and the plaintiffs that if Cordell paid this indebtedness within a period fixed in the agreement the bill of sale should be canceled, as the witness expressed it. In any event, the agreement was that the bill of sale was a security for the payment of the indebtedness, and if said indebtedness were paid within the time mentioned, the sale should be considered as null. Thereupon, the agent of the plaintiffs marked these barrels of whisky with the names of the plaintiffs, and also by cutting a cross upon the barrels. He took the whisky from where it was stored, in the back room of the store, and placed it in the center of the room. It was left in the possession of Cordell in that place, in his warehouse. The only acts tending to show a delivery from Cordell to the plaintiffs were the moving of the barrels of whisky from one place in the store to another, and the marking as above described. Cordell continued in the possession of the said building, the front room of which appeared to be used as a salesroom, and the back room as a warehouse. Thereafter, and on November 25th,

Cordell made a general assignment for the benefit of creditors to Sutton, the other defendant in this action. That assignment included the whisky above described. All of the assigned property, with the whisky, was delivered to Sutton, and he took exclusive possession of the same. He refused to deliver the whisky to plaintiffs upon their demand. The case was tried to the court below without a jury, and the decision and judgment were in favor of plaintiffs. Defendants moved for a new trial, which was denied, from which order and from the judgment they appeal. The contention of the appellants and the point raised upon this appeal is, that the sale from Cordell to the plaintiffs was in effect an attempt to create a chattel security, and that as the instrument (bill of sale) was not verified and filed as a chattel mortgage, nor the actual delivery of the chattels made, it was void as to Sutton, the assignee; the respondents contending, on the other hand, that the sale, even if construed as a mortgage, was good as between Cordell and plaintiffs, and that Sutton, assignee, steps into the position of Cordell, assignor, and has no more rights than Cordell, and therefore cannot hold the property as against the sale from Cordell to the plaintiffs.

F. T. McBride, for Appellants.

The bill of sale did not comply with any requirement of the law in reference to chattel mortgages, and the possession of the said property was by plaintiffs allowed to remain in Cordell. The bill of sale was therefore void as against all parties except Cordell. (Comp. Stats., div. 5, §§ 1538, 1539, 1540, 1549.) The instrument under which defendant Sutton claims, preferred other creditors of Cordell other than plaintiffs herein, and Sutton having taken immediate possession of the property in controversy and maintained the same, the right of the said preferred creditors and defendant Sutton, acting for them, was superior to any claim of plaintiffs to the property in controversy. (Comp. Stats., §§ 1538, 1539, 1540, 1549; *Milburn Mfg. Co. v. Johnson*, 9 Mont. 537; *Putnam v. Reynolds*, 44 Mich. 113; *Hanes v. Tiffany*, 25 Ohio St. 549; Jones on Chattel Mortgages, § 244.)

W. I. Lippincott, for Respondents.

The defendant, as the assignee of Cordell, succeeded only to the rights of Cordell, and is affected by all the equities against him, and takes the property of his assignor subject to all equities, existing liens, charges, and offsets. He takes no better title and no higher rights than the assignor had, and is not a purchaser for a valuable consideration. (*Luckenbach v. Brickenstein*, 5 Watts & S. 145; *German Savings Inst. v. Adae*, 8 Fed. Rep. 106; *Hodgson v. Barrett*, 33 Ohio St. 63; 31 Am. Rep. 527; *Gardner v. National City Bank*, 39 Ohio St. 600; *James v. Mechanics' Nat. Bank*, 12 R. I. 460; *Morris' Appeal*, 88 Pa. St. 368; *Kepler v. Erie Dime Savings etc. Co.*, 101 Pa. St. 602; *Gammone v. Holman*, 11 Or. 284; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Lycooming F. Ins. Co. v. Storrs*, 97 Pa. St. 354; *Frow v. Downman*, 11 Ala. 880; *Carter v. Lipsey*, 70 Ga. 417; *Pierson v. Manning*, 2 Mich. 445.) Counsel for appellant admits that the sale is good as against Cordell. If the sale is good as against Cordell, it is good as against the defendant, for the assignee stands in the shoes of the assignor, and cannot be put into a position different from the assignor, unless fraud has been practiced upon him; and he takes an assignment subject to all rights of setoff, legal or equitable, whether he has notice or not of any such rights. (*Dupont v. Wertheimer*, 10 Cal. 354; *Reynolds v. Harris*, 14 Cal. 668; 76 Am. Dec. 459; *Wells v. Clarkson*, 2 Mont. 230; *Wells v. Clarkson*, 2 Mont. 379; *Burrill on Assignments*, p. 616, and notes; Comp. Stats., p. 61, § 5, c. 1; Civ. Proc., div. 1.

DE WITT, J. We are of opinion that the contentions in this case are determinable under the provisions of our law in reference to personal property securities. (General Laws, Comp. Stats., div. 5, c. 92.) That chapter provides, among other things, as follows: "The provisions of the foregoing sections of this chapter shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property." (Comp. Stats., § 1549.) It is perfectly clear that the bill of sale in this case falls within the purview of this section. The transaction between Cordell, the debtor, and

Story & Co., his creditors, in which the bill of sale was given, was intended to "have the effect of a mortgage or lien upon" the whisky. Therefore, this transaction being subject to the provisions of chapter 92, section 1538, is applicable, and that section is as follows: "No mortgage of goods, chattels, or personal property shall be valid, as against the rights and interests of any other person than the parties thereto, unless the possession of such goods, chattels, or personal property be delivered to and retained by the mortgagee, or the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent, an affidavit of those present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged and filed as hereinafter provided."

Applying the law to the facts, we observe that the possession of the personal property was not delivered to and retained by Story & Co., who were in the relation of mortgagees, as described in section 1538. Nor again, was the instrument—bill of sale—which by section 1549 is to be treated as a mortgage, accompanied by the affidavit mentioned in section 1538, nor was it acknowledged as therein provided. Applying the further provisions of section 1538, we observe that the transaction was void as against the rights and interests of any other person than the parties thereto. The rights of persons (which rights Sutton represents) other than the parties to that transaction having intervened, that transaction is void as to those rights. The judgment is therefore reversed.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

PALMER, APPELLANT v. ISRAEL ET AL., RESPONDENTS.

[Argued May 28, 1892. Decided May 22, 1893.]

INJUNCTION—Trespass—Multiplicity of suits.—Injunction will lie at the suit of a contractor, having a valid contract with a city to pave and curb a street, and who is liable to penalties for its nonperformance, to enjoin trespassers who obstruct and delay the performance of the work and threaten to continue such acts, where the injury is continuous and repeated, and actions at law for damages against such trespasser would involve a multiplicity of suits.

13	209
15	235
23*	134
28*	1079
13	209
34	123
134	134

Appeal from First Judicial District Lewis and Clarke County.

Action for an injunction. An order dissolving the injunction was granted by BUCK, J. Reversed.

D. S. Wade, for appellant.

I. The contract gave to the appellant the exclusive right to pave and curb Main street in front of the lots of defendants, and having this exclusive right, manifestly his remedy was an injunction, provided his contract was valid, and he had no adequate remedy at law.

II. The allegations of the complaint are to be taken as true. It is alleged that the appellant has the exclusive right to pave and curb this street in front of said lots, and that the defendants and respondent have taken possession of said street and excluded the appellant therefrom, and are preventing, hindering and delaying the appellant in paving and curbing said street. This is a public work, and if the appellant has the exclusive right, he may protect his right by injunction. Having the exclusive right to pave and curb this street, he is not to be driven from the street by strangers. Deriving his authority from the city, he has the same right to protect his work unmolested, that the city would have to protect any public improvement. Injunction would be the proper remedy for the city in such a case, and the appellant under his contract has the same remedy. (See 1 Dillon on Municipal Corporations, 4th ed., §§ 659, 660, 680, and authorities cited in notes.)

III. But it is said that the appellant had a remedy at law. What was his remedy at law? He was interfered with and

driven out of the streets while lawfully doing a public work for the city. He is subject to a penalty if he fails to do this work within a specified period. He who has the exclusive right to do any lawful act may enjoin unlawful interference with the performance of such act. A patent right is only the exclusive right to do certain things. Injunction is the proper remedy for the protection of such an exclusive right. An action for damages would be wholly inadequate, and so it would be in the case of any exclusive right.

IV. The theory of the defendants seems to be that they have the right to prevent the city of Helena from paving and curbing its streets, because they are not insolvent, or rather because it is not alleged that they are insolvent. This is not a case in which the insolvent theory can be invoked. The city has the right to curb and pave its streets. This right is given by the legislative assembly. In the protection of this right the financial condition of those who wrongfully interfere is wholly immaterial. This exclusive right given by the city to the appellant is in the nature of a franchise. It is property. To deprive the appellant of his right is the destruction of the appellant's property. It is destroying the substance of the thing itself. It is like carrying away the soil from a pasture, or the ore from a mine, and in such cases it is wholly immaterial whether the wrongdoer is solvent or insolvent.

V. The admission that the appellant has the exclusive right to pave and curb this street, and that the respondent is wantonly destroying that right, is sufficient to call into action the writ of injunction, whose office is to prevent the commission of an irreparable injury. The destruction of a valuable franchise or privilege is such an injury.

A. C. Botkin, for Respondent.

I. The complaint does not allege that the plaintiff had no plain, speedy, and adequate remedy at law, and that fact is not deducible from the specific averments. (a) The city of Helena owns its streets in fee. (b) The plaintiff had a contract with the city to perform certain work on a part of a certain street. It was thereupon the duty of the city to see that the plaintiff was not obstructed in the performance of his contract.

If it failed in this duty, the plaintiff had his abundant remedy in damages.

II. There is no allegation of the insolvency of the defendants. (a) The facts set up in the complaint constitute a trespass upon a public street, or perhaps more technically, a *purpresture*. (b) The writ is not used against a naked trespass, except in case of the insolvency of the defendant.

III. The plaintiff, who does not declare as an abutter, or as one of the public whose right to the use of the street for its ordinary purposes as a highway has been interfered with, but merely as a contractor, has no standing to invoke an injunction against a trespass.

PEMBERTON, C. J. This is an appeal from the order of the court below, dissolving an injunction. It appears that the appellant, who was plaintiff, on the sixth day of October, 1891, entered into a contract with the city of Helena to pave and curb a certain portion of Main street in said city; that under said contract he had the exclusive right to do the work specified therein, and the right to occupy and use said street for the performance of said work; that while engaged in performing said work, the respondent, with others, entered upon said street and excluded appellant therefrom, and hindered, delayed, and prevented him from performing his contract with said city; and that said respondent, with others, threatened to continue to so do, to the great and irreparable injury of the appellant. The appellant brought this suit to enjoin respondent and others from so interfering and delaying, and damaging him in the performance of said contract. I. L. Israel, Leroy Beveridge, and L. Auerbach, were made parties defendant with respondent herein, but did not resist the injunction. Respondent Sears alone moved for a dissolution of the injunction. The court below, on his motion, dissolved the injunction, from which action of the court this appeal is prosecuted.

The grounds of the motion are. 1. That the complaint does not show that plaintiff has no plain, speedy, and adequate remedy at law; 2. The said injunction is to restrain an alleged trespass, but it does not appear, from the facts set forth in the complaint, that the injury is irreparable, or that the respond-

ents, or any of them, are insolvent. The respondents concede the validity of the contract between the appellant and the city of Helena, under which appellant was curbing and paving Main street in said city, when excluded therefrom, and hindered, delayed, and damaged, as alleged in his complaint, by respondent and others. This contract subjected appellant to heavy forfeitures and penalties in the event of his failure to complete the same within the time therein specified. If the city had been engaged in the performance of this work on its own account, and had been obstructed, hindered, delayed, and damaged by respondent and others in the manner alleged in the complaint, with the threat to continue in the doing of said wrongs, we are of the opinion that the city could have enjoined such trespass and wrongs. (See 2 Dillon on Municipal Corporations, 4th ed., § 659, and authorities cited in note.) That the city could delegate its authority to do this work to the appellant is not questioned in this case. Then, why may he not, like the city, enjoin persons from coming upon the street he is occupying in the performance of his contract, and obstructing his work, excluding him from said street, hindering, delaying, and damaging him, and who threaten to continue the perpetration of such wrongs, injuries, and trespasses? All these things are alleged in the complaint in this case. Mr. Pomeroy says: "If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." (Pomeroy's Equity Jurisprudence, 2d ed., § 1357.)

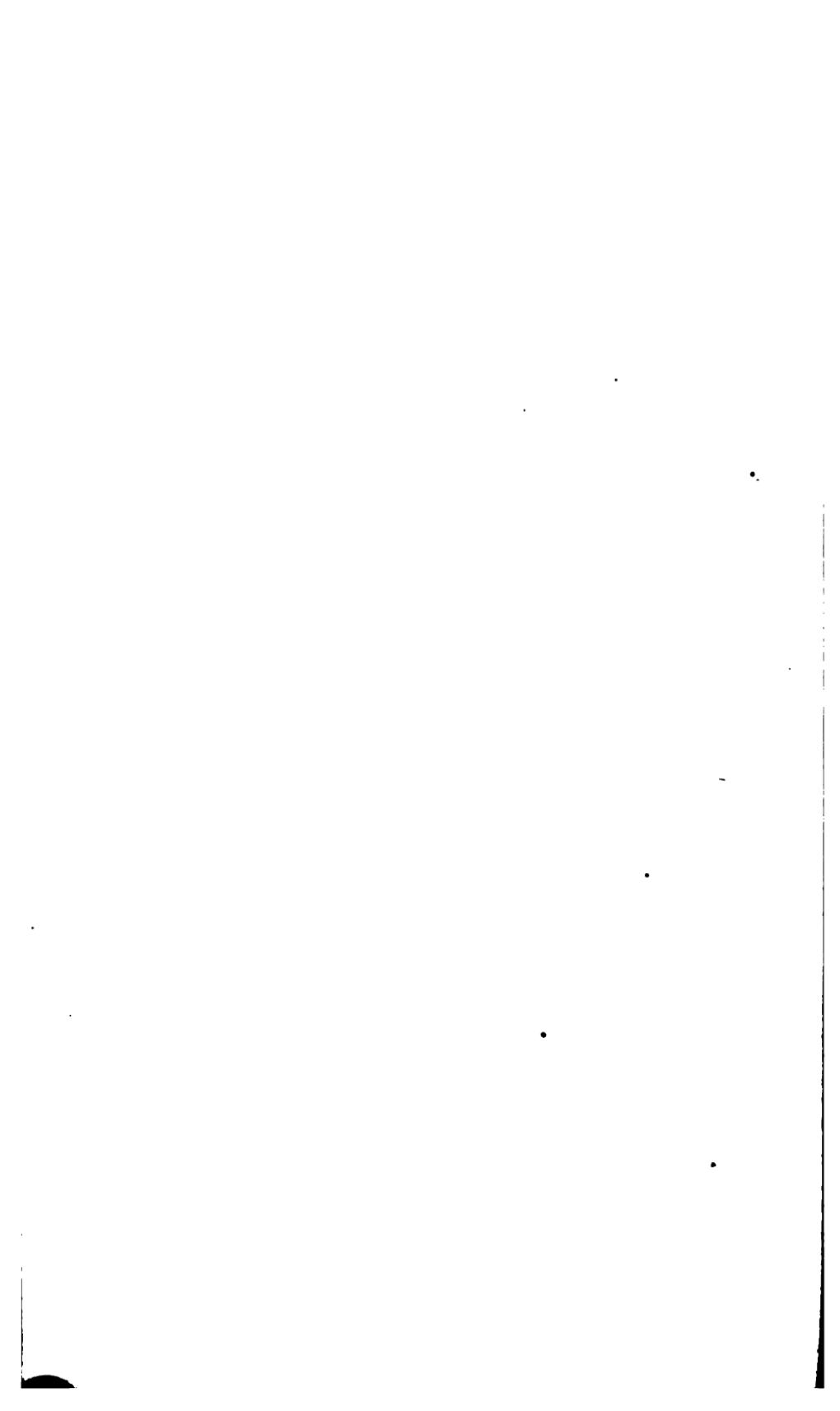
The respondents further contend that it does not appear from the complaint that the injuries resulting to the appellant were irreparable, or that the alleged wrongdoers were insolvent, and hence appellant had a remedy at law against them, after waiting and ascertaining his damages, or that he might proceed against the city for failing to protect him while performing his contract. This contention seems to admit the way clear to a multiplicity of suits, to prevent which is clearly the

province of a court of equity, by injunction. In Pomeroy, *supra*, this able author says: "All the cases, English and American, have professed to adopt the inadequacy of legal remedies as a test and limit of the injunctive jurisdiction; but, in applying this criterion, the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable, and the legal remedy inadequate in many instances, and under many circumstances, where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined which, if committed, would fall far short of destroying the property, or of rendering its restoration to its original condition impossible. The injunction is granted, not merely because the injury is essentially destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages. While the same formula is employed by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged. Judges have been brought to see and to acknowledge —contrary to the opinion held by Chancellor Kent—that the common-law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed." (Section 1357, *supra*. See, also, authorities cited in note.)

From the foregoing consideration and authorities we are of opinion that the appellant, upon the facts stated in his complaint, was entitled to an injunction, and that the court below erred in dissolving the same on the motion of respondent. The judgment of the court below is reversed.

Reversed.

HARWOOD, J., and DE WITT, J., concur.



CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1893.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.
Hon. EDGAR N. HARWOOD,
Hon. WILLIAM H. DE WITT, } Associate Justices.

SCHWABE, RESPONDENT, v. LISSNER ET AL., APPELLANTS.

[Submitted January 16, 1893. Decided June 6, 1893.]

JUSTICE OF THE PEACE—Power to open default.—A justice of the peace upon a proper showing has power to set aside a default and judgment entered thereon, and allow a defense to be interposed under section 804, title XVIII, of the Code of Civil Procedure, relating to procedure in justices' courts, which provides that the provisions of the Code of Civil Procedure relative to practice, pleading, and trial in the district courts shall, so far as applicable, be observed in justices' courts, section 116 of such code permitting default judgments to be vacated in the district court in certain cases. (*Gage v. Maryatt*, 9 Mont. 265; *Pincus v. Dowd*, 11 Mont. 88, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

Plaintiff's application for a writ of prohibition commanding a justice of the peace to refrain from hearing a motion to set aside a default and judgment entered against defendants was granted by BUCK, J. Order reversed.

Toole & Wallace, for Appellants.

I. The provisions of section 116 are as much a part of the Justices' Practice Act as if they were rewritten at length therein, and a justice court has complete power under the provisions of that section to entertain motions to vacate judgments. It was insisted by respondents in the court below that this section 116 conferred a power or jurisdiction upon a court, and that the word "practice" used in section 804 did not comprehend any provisions conferring power. This contention narrows itself down into an inquiry into the meaning of the word "practice," and an inquiry whether section 116 is a provision of "practice." Law is divided into substantive and adjective law. (*Rapalje's and Lawrence's Law Dictionary*, definition "Law," p. 731.) "Adjective law," or "procedure," comprehends and consists of three divisions—pleading, practice, and evidence; and any provision whereby substantive law—i. e., "rights or obligations"—are effectuated, is either a provision of "practice," "pleading," or "evidence." (See definition "Procedure," *Rapalje's Law Dictionary*, p. 1016; definition of "Practice," *Rapalje's and Lawrence's Law Dictionary*, p. 990.) The definition above referred to shows that in a comprehensive sense the word "practice" is synonymous with "procedure." The provision of section 116, herein quoted, must then, being a provision of procedure, be either one of practice, pleading, or evidence, and as such, within this classification, it is confessedly one of practice, and so becomes applicable to justice courts. To deny this privilege would be to make a justice's judgment, however erroneously rendered, as impregnable as granite, since no relief could be sought either by appeal, as shown above, or by motion for a new trial (because there must first have been an issue of fact tried), or by bill in equity. (*Hunter v. Hoole*, 17 Cal. 418.) The two decisions of the supreme court of California (*O'Connor v. Blake*, 29 Cal. 312; *Winter v. Fitzpatrick*, 35 Cal. 269), seeming to maintain a contrary position, were decided under an entirely different condition of the statutes. It has been repeatedly decided that no appeal lies from a default judgment of a justice. (*People v. County Court*, 10 Cal. 19; *Martin v. District Court*, 13 Nev. 85; *Funkenstein v. Elgutter*,

11 Cal. 328.) And it is equally settled law that an appeal will lie from a judgment by default where a motion was made in the court below to vacate it. (*Buller v. Heeb*, 38 Iowa, 429; *Hallock v. Jaudin*, 34 Cal. 167; *Pearson v. Carson*, 69 Mo. 569; *Lauferty v. Prickett*, 50 Ind. 24; *Leavenworth etc. Ry. Co. v. Forbes*, 37 Kan. 445. See also 12 Am. & Eng. Ency. of Law, pp. 471, 474, 483; Cowdrey's Justice Treatise, § 1204.)

II. The prior decisions of this court upon this question clearly declare the law, and should not be disturbed. (*Pincus v. Dowd*, 11 Mont. 88; *Gage v. Maryatt*, 9 Mont. 265.)

Thomas C. Bach, for Respondent.

I. It is conceded that unless the power has been given to the justices' courts, by statute, to vacate their judgments, the power does not exist. The vacating of a judgment involves the power or jurisdiction to do a thing, and not the mode of exercising that power, which is merely practice. Again, all of the authorities, when speaking of vacating a judgment, use either the word "power," or the word "jurisdiction;" never the word "practice." See Black on Judgments, § 297. (*Fredericks v. Davis*, 6 Mont., 460); and cases cited in *Territory v. Clayton*, 8 Mont. 1); and New York cases cited, *infra*. The definitions of "practice" given by the different authorities clearly draw the distinction between power and practice. See Bouvier's Law Dictionary, Black's Law Dictionary, Anderson's Dictionary of Law, Rapalje and Lawrence's Law Dictionary, Burrill's Law Dictionary. Two things are noticeable from these definitions: 1. That they refer to the mode of invoking the action of the court. 2. That practice was formerly a system of rules made by the court, and even now our courts of record can make rules of practice not inconsistent with express law. In New York at one time the statute governing justices of the peace provided that a justice had the same power as to hearing, trying and determining causes as courts of record. Certainly those words are as broad as the words "provisions . . . relative to practice, pleading and trial," found in our section 804. It was held, however, that such courts could not

set aside a judgment by default. (See *People v. Lynde*, 8 Cow. 133.) Under the same statute it was held that although a court of record could correct a mistake in a judgment entered, that a justice of the peace could not do so. (See *People v. Delaware Com. Pleas*, 18 Wend. 558.)

II. An inspection of section 116 will show that it really provides for the vacation of a judgment: 1. During the term at which the judgment was rendered. 2. Within five months after the adjournment of the term. We insist that there is no term for a court of a justice of the peace, during which a judgment could be made, and there would be no time from which the five months could commence to run. Again, the granting of such an order by a district court can be appealed from, and reversed for abuse of discretion. But a similar order made by a justice of the peace would be (as appellant says) "as impregnable as granite," because any appeal taken to the district court, after a trial had on such an order, could result only in a trial *de novo*, and moreover the only appeal given is from a judgment. We refer to the reasoning in *Foster v. Hauswirth*, 5 Mont. 566, as peculiarly applicable to this cause.

HARWOOD, J. The question of law brought up for determination in this case is whether or not a justice of the peace has power to set aside a default and judgment entered thereon in his court, and permit a defense to be interposed, upon timely application, showing sufficient grounds therefor.

The facts which gave rise to this question originated in the court of Charles F. Gage, justice of the peace of the city of Helena, within and for Lewis and Clarke county, as follows: In said cause pending before said court, the default of defendants for want of answer, and judgment, were entered against them at 7:30 P. M., June 11, 1892; that on the same day, three and one-half hours after the entry of said default and judgment, defendants appeared and filed a verified answer, containing denials, whereby issues were raised, and also alleging affirmative matter, which, if true, would constitute a meritorious defense to plaintiff's cause of action; and having at the same time given notice to plaintiff's counsel, who appeared, defendants moved the court to set aside said default

and judgment, predicating their motion upon the ground of "mistake, surprise, inadvertence, and excusable neglect." This was accompanied by affidavits showing facts which are conceded to be sufficient to support the motion in case the justice possessed jurisdiction to entertain it. Plaintiff thereupon moved the court to strike said motion from the files, on the ground that the justice had no jurisdiction to entertain such motion, or to set aside said default and judgment; and at the same time notified the justice that plaintiff did not wish to be heard on the merits of said motion. Thereupon the motion was submitted to the court, and the justice admits (in his answer to this proceeding) that, believing he had jurisdiction to entertain said motion, "under the provisions of section 733, 804, and 116, division 1, of the Compiled Statutes, and generally under the laws and decisions of this state," he intended to act upon the same. But it appears that at this juncture plaintiff's counsel procured from the district court within and for said county a writ of prohibition, commanding said justice of the peace "to refrain from hearing a motion to set aside a default and judgment" entered in said action. On the hearing of said proceeding for prohibition the district court ordered the same to be made final, whereupon this appeal from that determination was prosecuted.

There appears to be no direct provision in title 18, division 1, of the Compiled Statutes, sometimes called the Justices' Code, authorizing a justice of the peace to set aside or vacate the entry of default against a defendant, and the judgment entered thereon, and allow a defense on the merits to be interposed. But it is prescribed in section 804 of said title that the provisions of the General Code of Civil Procedure "in relation to parties to actions in the district courts, and relative to practice, pleading, and trial, shall, so far as the same are applicable, and do not conflict with this title, be observed in justices' courts." By virtue of that provision the justice of the peace in the case above mentioned concluded that section 116 of the Code of Civil Procedure was applicable to his court, and that thereby he was authorized to entertain said motion for such ruling as the facts warranted. Section 116 provides, among other matters, that "the court may likewise, upon affidavit

showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in any other particular; and may, upon like terms, allow an answer to be made after the time limited by this act; and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Our consideration of this question has led to the conclusion that the justice of the peace was proceeding according to his jurisdiction, as prescribed by law, when his action was arrested by the writ of prohibition. Respondent's counsel evidently admits that the intention of the legislature, as shown in section 804 of the Code of Civil Procedure, was that the provisions of the Code of Civil Procedure should govern and "be observed in justices' courts" in "so far as the same are applicable and do not conflict with" the special provisions of the Justices' Code; nor does it appear to be contended that there is any conflict or inapplicability of the provision of the code cited as authority for the justice to entertain and pass upon said motion. But counsel for respondent argues that section 804 only makes the provisions of the General Code "relative to practice, pleading, and trial" applicable to the justices' court, and contends that the question here does not relate to practice, pleading, or trial, but to the jurisdiction or power of the justice to do a certain thing; that the opening of a default on a sufficient showing of grounds, as provided in section 116 of the code, is an exertion of judicial power, not within the realm of practice, pleading, or trial, and therefore the justice cannot invoke that section as authority for entertaining the motion in question. We think that we fully comprehend the distinction urged, but conclude that it is entirely inapplicable to the point under consideration. Nor do we find that the various citations of counsel for respondent support his contention that an application to the court to vacate a default, and the hearing and order of the court thereon, is a matter not included within the clause, "practice, pleading, and trial," as used by the framers of the code. Nor do we concur in the affirmative argument that

there is an entire disconnection between "power" and "practice," as pertaining to statutory provisions directing or commanding certain procedure of a court upon the showing of certain facts in the course of an adjudication. It is, of course, true, and is not otherwise contended, that the justice of the peace, as well as all courts, must administer law, and adjudicate upon cases within their jurisdiction. The case in question, as well as the parties thereto, were within the jurisdiction of the justice. That court therefore had power over the case to adjudicate and determine the controversy and execute its judgment, proceeding in the manner prescribed by law. Now, if the statute provided that the justice "may" or "shall" proceed thus and so, upon the showing of certain facts, or the happening of certain events pertaining to the cause, in the course of its adjudication, determination, and execution of the judgment, we think it would be quite hard to maintain that such action of the justice had no relation to the "practice" therein, according to the common understanding and acceptation of those terms, as applied to the proceedings of courts. And again, where the statute does provide that, in relation to practice in the course of adjudicating and enforcing rights or redressing wrongs, the court, in view of certain facts occurring and shown, "shall" or "may" proceed thus and so, we do not think it can be maintained that the court has no authority to do the thing prescribed.

It has been held in many jurisdictions that an appeal from a judgment taken by default would be of no avail, because the judgment is in the nature of one confessed. If it should be so held here, and, further, that the justice was powerless to relieve from a judgment taken by default, on timely application and sufficient showing, there would be no remedy at all, whatever disaster or uncontrollable circumstance may have prevented defendant from appearing within time. Such a situation does not prove that there are statutory provisions authorizing the justice to vacate a default. But where statutory provisions have been inserted, directing the justice to look to the General Code for guidance where the Justices' Code is silent, we think such considerations as just suggested have some bearing to indicate whether our constructions tend towards a heathful

interpretation in favor of natural right (Code Civ. Proc., § 638), or whether the interpretation tends to destroy the spirit. While the point under consideration may not have been directly involved in *Gage v. Maryatt*, 9 Mont. 265, and in *Pincus v. Dowd*, 11 Mont. 88, still the treatment in those cases shows a view in harmony with this. We hold that both within the spirit and the letter of the statute the justice of the peace had authority in the premises to entertain the motion for such ruling as the showing warranted.

The order of the district court granting prohibition will be reversed, and the proceeding remanded, with directions to dismiss the same.

Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., concurs in the result.

18 222
24 293

ADAMS, APPELLANT, v. BANKERS' LIFE ASSOCIATION, RESPONDENT.

[Submitted June 6, 1893. Decided June 12, 1893.]

APPEAL—Record—Failure to show error.—A judgment will be affirmed where there is nothing before the appellate court but the judgment-roll, upon which no error appears or is suggested, and a bill of exceptions, which is merely a skeleton containing a direction to insert matter therein, which is neither inserted nor in the record by reference.

Appeal from First Judicial District Lewis and Clarke County.

Judgment was rendered for the defendant below by BUCK, J.
Affirmed.

T. J. Walsh, for Appellant.

Adkinson & Miller, for Respondent.

PER CURIAM.—In this case we have heretofore sustained a motion striking from the record a large portion thereof. The appeal is from the judgment. All that is now before us is the judgment-roll, and a paper which is claimed to be a bill of exceptions. Appellant has filed no brief, and made no argument, and in no way suggests any error apparent upon the

judgment-roll. Our examination does not disclose any error. (*Territory v. Stanton*, 8 Mont. 157.) The bill of exceptions is a mere skeleton, containing notes to the effect, "Here insert," but the matter to be inserted is not inserted, nor is it in the record by reference. The judgment is therefore affirmed.

HOPKINS, RESPONDENT, v. BUTTE AND MONTANA COMMERCIAL COMPANY, APPELLANT.

[Argued February 23, 1893. Decided July 17, 1893.]

WATERS—Damages from overflow—Instructions.—A person engaged in a legitimate business is only liable to another for such injuries as result from negligence or the want of ordinary care and prudence in the management thereof, and therefore, in an action for damages for causing an overflow of plaintiff's land by floating logs down a stream it is error to charge that though the defendant's business was legitimate it must so conduct it as not to cause injury to the plaintiff, and if the defendant's logs had jammed, forming a gorge which retarded the natural flow of the stream, and the gorge was suddenly released, causing plaintiff's lands to be submerged he was entitled to recover, as such charge practically ignores the question of negligence. (*Bielenberg v. Montana Union Ry. Co.*, 8 Mont. 271, cited.)

Appeal from Eighth Judicial District, Cascade County.

Action for damages. The cause was tried before BEN-TON, J. Plaintiff had judgment below. Reversed.

Arthur J. Shores, for Appellant.

Leslie & Downing, for Respondent.

PEMBERTON, C. J.—The respondent, who was plaintiff below, alleges in his complaint that he is the owner of a ranch in Cascade county, and engaged thereon in raising grass, wheat, oats, vegetables, etc.; that a certain stream, known as Deep creek, flows through his said ranch; that in the month of July, 1891, the appellant (defendant below) was engaged in floating logs down said stream to its mills, located at the city of Great Falls; that the appellant had theretofore erected large dams or reservoirs on said stream, above the lands of respondent, for the accumulation of water to assist in floating said logs when the water was low in said stream; that appellee

13	223
15	359
16	464
18	223
22	408

13	223
36	387
36	362

lant had cut and placed in said stream above the lands of respondent a large quantity of logs to be floated down said stream to its mills; that said logs had formed a jam or boom in said stream that obstructed the natural flow of the water therein, and backing up the water in large quantities above the lands of respondent, so that the jam, gorge, or boom, was suddenly released, and caused said stream to swell and overflow its banks, submerging respondent's lands, and by means thereof caused quantities of muddy water, logs, rafts, rubbish, and dirt to flow over and upon respondent's lands, damaging the lands, crops, fences, etc., of respondent.

The second count in the complaint charges substantially the same facts as above, and in addition thereto, after alleging that said logs formed a jam, etc., in said stream above respondent's lands, alleges that "the defendant (appellant) wrongfully, through its agents and servants, suddenly released said water, which caused said stream to rise above the level thereof, and that by reason thereof plaintiff's (respondent's) land was submerged," etc., and by reason thereof respondent was damaged.

The appellant filed a general demurrer to the complaint, which was overruled by the court, and appellant excepted. Answer and replication were filed, the answer denying all the allegations of the complaint. The cause was tried to a jury, and verdict and judgment rendered for respondent.

Appellant filed its motion for new trial, which was overruled. Whereupon appellant appealed from the order overruling motion for new trial, and from the judgment of the court below.

On the trial of the case counsel for appellant requested the court to give the jury the following instruction: "The plaintiff's action is based on the alleged negligence of the defendant in the conduct of its business upon Deep creek. There is no presumption that it was unlawful for defendant to float logs down this stream, and the plaintiff can recover of defendant in this action only by showing that it was guilty of a want of ordinary care and prudence in the conduct of its business upon this stream, and that the plaintiff has sustained damage because of such lack of care." The court refused this request, and instructed the jury as follows: "There is no presumption that it

was unlawful for defendant to float logs down this stream. The defendant had the right to use such stream for such purpose, and they were engaged in a legitimate business, but while engaged in such business the defendant was obliged to conduct its business in such manner as not to cause injury to the plaintiff. And if you believe from the evidence that in July, 1891, the defendant had placed in Deep creek above the lands of the plaintiff a large quantity of logs to be floated down said stream to their mill, which had jammed together, forming a gorge, and such jam obstructed and retarded the natural flow of said stream in large quantities, so that such jams and gorges were suddenly released, causing said stream to swell and raise above the level thereof, thereby submerging plaintiff's land with water, and thereby caused large quantities of water, logs and rubbish to flow over said plaintiff's land, and his growing crops were destroyed by reason thereof, you will find for the plaintiff in whatever damages you may believe from the evidence he has sustained."

The action of the trial court in refusing the request of appellant and in giving the instruction quoted above is the principal error assigned in the record.

The gist of this action is negligence; and until some negligence is shown there cannot be said to be any liability. (*Bielenberg v. Montana Union Ry. Co.*, 8 Mont. 271.)

We think the instruction requested by appellant correctly stated the law of the case, and should have been given. (*Carter v. Thurston*, 58 N. H. 104; 42 Am. Rep. 584; *Field v. Apple River L. D. Co.*, 67 Wis. 569.) The instruction given by the court practically ignored the question of negligence, and told the jury to find for the respondent for whatever damages he had sustained by the acts of the appellant in placing the logs in said stream, whether the appellant was guilty or not of any negligence or want of care in the conduct of its business, or whether the damage resulted from causes beyond appellant's control, and this, too, after instructing the jury that the appellant had a right to place its logs in said stream, and that it was engaged in a legitimate business. Ordinarily, if a person is engaged in a legitimate business, he is only liable to another for such injuries as result from negligence or the want of

ordinary care and prudence in the conduct and management thereof. Tested by this rule, we think the instruction given by the court below did not correctly state the law governing the case.

There are other errors assigned, but we do not deem it necessary to consider them.

The order of the court below denying a new trial is overruled, the judgment reversed, and the cause remanded for new trial.

Reversed.

HARWOOD, J., and DE WITT, J., concur.

SCHUTTLER ET AL., RESPONDENTS, v. KING, APPELLANT.

[Argued October 24, 1892. Decided July 17, 1893.]

PLEADING—Sufficiency of complaint on negotiable instrument.—A complaint in an action on a promissory note which averre the execution and delivery of the note for a valuable consideration, stating the date, consideration, parties, principal sum, rate of interest, the amount due and unpaid, and that the plaintiffs are now the owners thereof and entitled to receive the money due and unpaid thereon, and have not indorsed or transferred said note, but that the same since its maturity has been lost, states a cause of action, and is not open to the objection that it does not show by any averment any promise in fact or by implication to pay any sum of money, or to pay the plaintiffs any money, nor when, according to defendant's promise, payment should be made.
LOST INSTRUMENT—INDEMNITY BEFORE SUIT.—Tender of indemnity before suit is not necessary to entitle a plaintiff to judgment in an action upon a lost negotiable instrument.

Appeal from First Judicial District, Lewis and Clark County.

Action on promissory note. Judgment was rendered for plaintiffs below by BUCK, J. Affirmed.

Thomas C. Bach, for Appellant.

Wade & Blackford, for Respondent.

PEMBERTON, C. J.—This is a suit on a promissory note alleged to be lost. The allegations of the complaint, omitting the formal parts, are as follows: "That on the twenty-second

day of January, 1885, the said defendant, J. R. King, and Wheatly Bros., of Bozeman, Montana, for a valuable consideration, executed and delivered to the said Schuttler & Hotz, as such partners, their certain promissory note of that date, for the sum of six hundred and seventy-nine and seventy-four-hundredths dollars (\$679.74), due on the 13th day of September, 1885, together with interest after maturity at the rate of 10 per cent per annum. That on the third day of January, 1887, the said J. R. King paid on said note the sum of \$91.69. That no other sum or amount has been paid on said note, and that there is now due and unpaid on the same, from said defendant King, the sum of nine hundred and seventy-seven and forty-seven-hundredths dollars (\$977.47), principal and interest to this sixth day of July, 1891. That the said plaintiffs are now the owners of said note, and entitled to receive the money due and unpaid thereon; that said plaintiffs, or either of them, have not indorsed or transferred said note, but that the same since its maturity has been lost."

The appellant (defendant below) was personally served with summons in this case, but made no appearance of any kind. Judgment was entered against him in accordance with the prayer of the complaint, on the sixth day of July, 1891. On the fourth day of June, 1892, this appeal was taken from the judgment. The contention of the appellant is that the complaint does not state facts sufficient to constitute a cause of action, or to sustain a judgment. The appellant especially contends that the complaint does not contain any of the following facts, each of which he claims the complaint should aver: "That the defendant ever made any promise to pay any sum of money, or any facts from which such a promise is by law implied. The complaint does not show by any statement of fact that any promise in fact or promise by implication to pay to plaintiff, or either of them, any money. The complaint does not contain any statement of fact showing when, according to defendant's promise, payment should be made; that is to say there is no statement of a breach of the contract."

In *Hook v. White*, 36 Cal. 299, in a case similar to the one under consideration, the court says: "The allegation in the complaint, 'that said defendant executed to this plaintiff a

'promissory note,' is equivalent to an allegation 'that defendant made his note payable to plaintiff;' and an allegation that defendant executed to plaintiff his note in writing, or made his note in writing payable to plaintiff, includes and imports a delivery of the same to plaintiff. (*Churchill v. Gardner*, 7 Term. Rep. 597; *Russell v. Whipple*, 2 Cow. 536.) The making and delivery of a promissory note by defendant to plaintiff imports a liability to pay in accordance with its terms, without any averment of a continuous holding or ownership; and after the allegation of the execution of the promissory note to plaintiff by defendant, a further allegation that plaintiff is still the owner and holder thereof would be surplusage. (*Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90; *Wedderspoon v. Rogers*, 32 Cal. 571.) Defendant not having denied the execution of the note to plaintiff, his liability to pay is a legal conclusion, and not having affirmatively alleged any fact showing that he had paid, or relieving him from the legal liability to pay, he was not entitled under his answer to offer any defense in evidence. (*Edson v. Dillaye*, 8 How. Pr. 274.)"

In *Ward v. Clay*, 82 Cal. 502, the court held: "Defects of form of averment or uncertainty cannot be urged upon general demurrer. . . . A complaint on a promissory note which states the material substance and legal effect of the note, showing its date, consideration, parties, principal sum, and rate of interest, and the amount due and unpaid, and avers that defendant refuses to pay the same, or any part thereof, and that plaintiff is still the owner and holder of the note, is not subject to a general demurrer on the ground that a copy of the note is not embodied in the complaint." (See *Graves v. Drave*, 66 Tex. 658.)

Our Code of Civil Procedure, section 85, requires the complaint to contain "a statement of the facts constituting the cause of action, in ordinary and concise language."

From a consideration of these authorities, we are of opinion that the complaint states facts sufficient to constitute a cause of action, and therefore sufficient to sustain the judgment appealed from.

The appellant contends that, this being a suit upon a lost negotiable instrument, an indemnity bond should have been

given or tendered by respondents before suit to enable them to recover judgment.

We do not think that the tender of indemnity can be considered as any part of the plaintiffs' cause of action, or as a fact or event upon which their right of action accrues. (*Randolph v. Harris*, 28 Cal. 562; 87 Am. Dec. 139, and cases cited.) The appellant can fully protect himself by demanding indemnity at the proper time and in the proper manner.

We are of the opinion that the judgment in this case should be affirmed.

Affirmed.

HARWOOD, J., and DE WITT, J., concur.

HORSKY ET AL., APPELLANTS, v. HELENA CONSOLIDATED WATER COMPANY, RESPONDENT.

[Argued February 16, 1898. Decided July 17, 1898.]

PLEADING—Assumption of contract.—The assumption and acceptance, by the defendant water company, of a contract to furnish water, made between plaintiff and another water company, is sufficiently shown where the complaint alleges that the defendant company assumed said contract, substituted itself for the old company, and performed acts only consistent with an adoption of the contract.

SAME—Contract—Consideration.—A valuable consideration for the assumption of a contract to furnish water is sufficiently shown by an allegation in the complaint that defendant, for a considerable time, collected the price and rates therein mentioned.

INJUNCTION.—An injunction will lie to restrain a water company from shutting off the entire water supply of a brewery in violation of a contract which it had assumed, when such act would stop the brewing, and involve the destruction of large quantities of malt, and loss of trade,

Appeal from First Judicial District, Lewis and Clarke County.

Action for an injunction. Defendant's demurrer was sustained by BUCK, J. Reversed.

Toole & Wallace, for Appellant.

I. The defendant having purchased the old company's property and franchise, and assumed the contract while plain-

tiffs were using their service-pipe thereunder, is directly bound by the obligations of such contract. (*Coffman v. Robbins*, 8 Or. 278, 284; Pomeroy's Specific Performance of Contracts, § 493.)

II. Having availed itself of the legal rights of the contract, that is, its benefits, and retained the rents collected thereunder, it cannot shirk its burdens, that is, its legal obligations. (*Boston etc. Co. v. Bankers' etc. Tel. Co.*, 36 Fed. Rep. 288; 5th General Digest of the United States, p. 626, No. 238, and cases; *Starr v. Stiles*, 19 Pac. Rep. 225, 226; *Bradner v. Howard*, 75 N. Y. 417, 421.)

III. Having knowingly furnished water and collected rents under the contract—acts only consistent with its adoption—and thereby led plaintiffs to believe that it had made the contract its own, defendant could not thereafter repudiate its obligations. (*Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 142 U. S. 396, 408, 409; *Frelinghuysen v. Nugent*, 36 Fed. Rep. 230; *Winchester etc. Co. v. Funge*, 109 U. S. 651, 653; *Porter v. Wormser*, 94 N. Y. 450.)

IV. Plaintiffs not only allege the performance of acts by defendant only consistent with the adoption of the contract, but distinctly aver that it "assumed" the contract, and "substituted itself for the old company therein," the latter averments being expressly declared by the supreme court of the United States in *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 142 U. S. 396, to be needless to bring about in law an adoption of the contract. In this case, then, we have gone so far as to allege the distinct assumption by defendant.

V. Even were defendant in fact not bound by this contract on the theory of substitution of parties or express assumption, yet, by its conduct relied on by us to our injury, it is estopped from disputing its obligations thereunder. (*State v. Hastings*, 15 Wis. 90, and cases there cited; *Midland R. R. Co. v. Hitchcock*, 37 N. J. Eq. 549; *Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 142 U. S. 408, 409; 2 Pomeroy's Equity Jurisprudence, § 965.)

McConnell, Clayberg & Gunn, for Respondent.

I. The effort is made to hold the defendant company responsible upon said contract upon the ground of assumption,

adoption, and acquiescence in the same. There is no averment that such assumption was for a valuable consideration. The question, then, is reduced to one of acquiescence. There being no contract between the Helena Water Company and the respondent, that the latter should assume the Woolston contract, it was at liberty to renounce said contract. (*Wiggins Ferry Co. v. Ohio etc. Ry. Co.*, 142 U. S. 396.) We insist that the allegations in the complaint are insufficient to set up a contract by acquiescence. The allegations of assumption and adoption, not being founded upon any consideration, must be rejected as surplusage. If there was such acquiescence in the contract and delivery of water under it that it established it as the contract between the respondent and the appellants, then the proper mode of averment would be to aver that such contract existed, leaving all the facts connected with the delivery and payment of water under its terms as matters of proof to establish the contract. The principle upon which the contractual relation is established by acquiescence between the plaintiff and defendant must be that in law there was a mutual consent to it and agreement to be governed by its terms; that is to say, while there were no words of express agreement, the conduct of the parties in relation thereto created an agreement as much so as if it had been made by express words. The same concensus of mind between the parties is as necessary in establishing a contract by acquiescence as it is one created by express words. It is bad pleading to set out the facts which constitute the evidence, instead of setting out the ultimate fact of the agreement. (*Maxwell on Code Pleading*, 76, 77, 105.)

II. There is a plain, speedy, and adequate remedy at law. (*Heaney v. Butte and Montana Com. Co.*, 10 Mont. 590; *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484; *Bracken v. Preston*, 1 Pinn. 584; 44 Am. Dec. 412; *Trustees v. Hoesli*, 13 Wis. 348; *Catching v. Terrell*, 10 Ga. 576; *High on Injunction*, §§ 701, 1106, 1107, 1109; *Mechanics' Foundry, etc., v. Ryall*, 75 Cal. 601.) Certainly it cannot be claimed that a brewing business destroyed by the wrongful conduct of the defendant could not be compensated in damages. But it is not essential, under this contract, that the appellants should be compelled to abandon their business of brewing. They might pay the in-

creased price under protest, and bring their action at law to recover it back. (*Chicago etc. R. R. Co. v. Chicago etc. Coal Co.*, 79 Ill. 121, 130.) It does not appear that the plaintiffs might not get water from other sources, and compensate themselves with damages by action at law for the breach of the alleged contract under consideration.

PEMBERTON, C. J.—This is a suit for injunction. The facts stated in the complaint are substantially as follows: Appellants (plaintiffs below), Horsky, Miller & Co., the owners of a large brewery, and having a valuable patronage and custom to which they steadily supplied the product of their brewery, made a contract on February 15, 1887, with one George F. Woolston, to furnish water for a term of ten years, for brewing and other purposes, at stipulated rates, through a system of water-mains to be built by the latter in the city of Helena. Woolston organized, on March 6, 1887, a corporation, "Helena Water Company," to which he sold all of his right in the above-mentioned contract and the contract itself for a valuable consideration paid by this company, which received and accepted the contract, and at once, on the date last named, entered on its performance, began furnishing water through the system of piping above mentioned, with which plaintiffs' private pipe connected, and continued to fully perform and discharge the contract until the year 1890, when it sold its entire assets, including the franchise, to the defendant company. Whereupon the defendant assumed and accepted this contract, substituting itself for the first-named company in the contract, and continued to comply with the terms of said contract, i. e., to permit plaintiffs to take and use the water through the system of mains and pipes above mentioned, and to collect therefor under it, until January 24, 1891, when it refused to longer recognize the contract, and was about to cut off entirely the water supply from plaintiffs' private pipes, because plaintiffs refused to pay prices therefor above the contract rates, and that if the water were so to be turned off it would stop plaintiffs from brewing, involve the destruction of large malt supplies, prevent them from supplying their customers, and cause a loss of their trade, on account of which

plaintiffs sought and obtained a preliminary injunction, restraining the defendant company from shutting off the water.

The second cause of action sets forth the same facts as the first, with the further fact that on the day when the defendant company repudiated the contract both Woolston and the Helena Water Company were insolvent, which said insolvency arose after the date when the defendant assumed the contract on its purchase from the Helena Water Company. That if defendant had repudiated the contract at the time of its said purchase, plaintiffs could have indemnified themselves against Woolston and the Helena Water Company for its breach, but are now utterly unable so to do, and that their failure to do so was brought about by their reliance upon this assumption of the contract by the defendant.

To the complaint the respondent interposed a general demurrer. The court below sustained the demurrer, and the appellants electing to stand on their complaint, judgment was rendered in favor of respondent for costs. From this judgment this appeal is prosecuted.

The principal error complained of is the action of the trial court in sustaining the demurrer to the complaint.

It will be observed that the complaint alleges that in the year 1890 the respondent assumed and accepted a certain contract, then and theretofore in force between the appellants and the Helena Water Company for furnishing water to the appellants by said Helena Water Company.

That part of the complaint which alleges such assumption, and acceptance by respondent, of said contract between the appellants and the Helena Water Company, after referring to the organization of the Helena Water Company, is as follows: "And that thereafter, the said defendant company having so purchased the said property, assets and rights of the said Helena Water Company, and from the date of the said last-named transfer and purchase by the said defendant company, it, the defendant company, assumed the said contract, accepted the same, entered upon the faithful performance thereof in accordance with its terms, substituted itself for the Helena Water Company therein, began forthwith to furnish, and continued, without interruption, to furnish, water under and in

accordance with the terms of said contract, as the Helena Water Company had before it, and to collect for the water so furnished from time to time the contract price for the water so furnished, collecting therefor under and on account of the said contract from these plaintiffs, and has continued so to do and to comply with the terms of the said contract until the twenty-fourth day of January, 1891."

Does the complaint state facts sufficient, if proved, to show an assumption and acceptance of the contract between the Helena Water Company and the appellants by the respondent?

In *Wiggins Ferry Co. v. Ohio etc. R. Co.*, 142 U. S. 408, a case involving facts and principles analogous to the case at bar, the court says: "It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conduct himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of his obligations."

It will be seen that the complaint in this case not only alleges the performance of acts by respondent only consistent with the adoption of the said contract between the appellants and the Helena Water Company, but it alleges that the respondent "*assumed*" said contract and "*substituted*" itself for the old company." In this respect we think the complaint states facts sufficient to constitute a cause of action.

It is urged by respondent that the complaint does not disclose a valuable consideration for the assumption of said contract by respondent. The contract between the appellants and the Helena Water Company is attached to the complaint and made a part thereof. The consideration therefor is therein named and the water rates stated. The complaint alleges that the respondent having assumed the contract between the Helena Water Company and appellants, furnished water thereunder, and collected the price and rates therein mentioned, of appellants, for a considerable length of time. We think this sufficiently discloses a valuable consideration.

It is contended by respondent that appellants' remedy, if they have any, is at law, and not in equity. We do not agree with this position. We think the facts stated in the complaint which are confessed by the demurrer, entitle the appellants to invoke the equity jurisdiction of the court, and to the negative and preventive relief of injunction.

There are other questions raised in the argument of this case, but we think they pertain to the trial of the cause upon its merits, and that a consideration of them at this time by this court would be premature.

We are of the opinion that the judgment of the court below should be reversed, and it is so ordered, and remanded with instructions to overrule the demurrer.

Reversed.

HARWOOD, J., and DE WITT, J., concur.

KREIGER ET AL., RESPONDENTS, v. SMITH, APPELLANT.

[Argued February 15, 1893. Decided July 17, 1893.]

HUSBAND AND WIFE—*Estoppel*.—A husband who has notified a merchant not to let his wife run any bills unless accompanied by his order is estopped to deny the right of his wife to purchase certain goods not necessaries, where it appeared that at the time of their purchase he was present and examined some of the goods and offered no protest or objection, giving her a check in the presence of the merchant to apply on the purchase, and that the goods were delivered at a residence of the husband where his wife resided and he part of the time, and where he saw some of the goods, but which he did not offer to return after knowing they had been charged to him.

Appeal from Sixth Judicial District, Park County.

Action for the price of goods sold. The cause was tried before HENRY, J. Affirmed.

Savage & Day, for Appellant.

In addition to the absolute right of a wife to pledge her husband's credit for the purchase of necessaries, there is given to the wife the presumptive agency to procure such articles as are usual and proper for her supervision of their domestic affairs. This authority "is purely and simply a question of agency,

which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied." "To hold the husband liable there must have been some affirmative proof of authority from him either express or implied from his acts and conduct." (*Bergh v. Warner*, 47 Minn. 250; 28 Am. St. Rep. 362; 9 Am. & Eng. Ency. of Law, p. 839, § 3; 1 Bishop on Marriage and Divorce, §§ 556, 558; *MacKinley v. McGregor*, 3 Whart. 369; 31 Am. Dec. 522; *Keller v. Phillips*, 39 N. Y. 351; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384.) In the case at bar there was no attempt made to show that the husband had failed or refused to supply his wife with the ordinary necessaries. Nor was there any question raised as to the right of the husband to revoke the wife's agency. The theory upon which the trial court proceeded was that the jury might find from the evidence that the husband had waived the revocation of the agency he had already made, or had ratified the act of the wife in purchasing the goods on his credit. There is no evidence of a ratification of the sale. The testimony only goes to the extent of showing that defendant afterwards saw some of the goods in the house where his wife lived, but fails to show any knowledge on his part that the goods had been purchased on his credit, or that he had any control over the property and refused to return them after knowing the facts. There can be no ratification without knowledge. (1 Am. & Eng. Ency. of Law, p. 437.) In fact some of the cases hold that in no event is the husband obliged to return the goods. *Devendorf v. Emerson*, 66 Iowa, 698; *Segelbaum v. Ensnimer*, 117 Pa. St. 248; 2 Am. St. Rep. 662.)

A. J. Campbell, for Respondent.

The testimony of the defendant, showing that he allowed the plaintiffs to part with their property upon the supposition that he purchased the same, and that he received the benefits of the sale, the goods still being in his possession at the time of the trial of this action, he is estopped from denying his liability, and the verdict of the jury was the only one which could have been entered upon the undisputed testimony of the

defendant himself. (*Walling v. Hannig*, 73 Tex. 580; *Witter v. Hoover*, 24 Neb. 605; *Heney et al. v. Sargent*, 54 Cal. 396; *Hopkins v. Mollinieux*, 4 Wend. 465; 1 Bishop on Marriage and Divorce, § 618; *Gilman v. Andrus*, 28 Vt. 241; 67 Am. Dec. 713; *MacKinley v. McGregor*, 3 Whart. 369; 31 Am. Dec. 522.)

PEMBERTON, C. J.—Respondents (plaintiffs below) received judgment in the court below against the appellant (defendant below) for goods, wares and merchandise purchased by appellant's wife, and charged to appellant. From this judgment, and the order of the trial court refusing a new trial, this appeal is prosecuted.

It appears from the evidence that respondents are merchants at Livingston; that appellant had purchased goods of them for some years, and that his wife had also done so, having the goods she purchased charged to appellant; that appellant becoming dissatisfied with the purchasing of goods by his wife and having them charged to him, gave to respondents the following notice in writing concerning the matter: "Krieger & Co., Livingston, Montana. Sirs. Please don't let my wife run any bills unless accompanied by my order. Don't tell her you are forbidden; tell her you must have my order, or would prefer it, and oblige. Yours, W. A. Smith." This notice was given in January, 1890. About May 1, 1890, the appellant, with his wife, visited the place of business of respondents, at least appellant and his wife were together in the store of respondents at that time, for two or three days, during which time the wife purchased of respondents a considerable bill of goods. (The goods sued for in this action.) The evidence tends to show that they were both looking at and examining the goods being purchased by the wife; that the wife called appellant's attention to some of the goods she was selecting and purchasing; that appellant gave his wife during the time a fifty-dollar check; that nothing was said between respondents and appellant at the time about the wife's right to purchase goods and have them charged to appellant; that the wife partially paid on the goods, the whole thereof being charged to the appellant. The goods were afterwards delivered at the residence of appellee.

lant at Castle, where it seems the wife generally lived, the appellant spending most of his time at Black Hawk, where he was engaged in business, and had another home. The appellant and his wife were not living separate and apart. He spent a part of his time with her at their home in Castle. It does not appear that the wife had any separate estate or business of her own. The appellant saw some of the goods at his home in Castle when he was there, he testifying that he "stayed there off and on during the summer." The appellant never returned, or offered to return the goods, or any of them, either before or after he knew they had been charged to him. The appellant made no inquiry of his wife at the time he saw her purchasing the goods, or at any other time, as to how they were to be paid for, or as to whom they were to be charged. He testifies that he notified his wife of the notice given respondents, quoted above. It is not contended that these goods were *necessaries* furnished the wife. The appellant is a man of considerable wealth. The case was tried with a jury, and verdict rendered for the amount sued for in favor of respondents.

The appellant contends that the presumptive agency of the wife to procure such articles as are usual and proper for her, according to the financial condition of her husband, was terminated and revoked by the notice offered in evidence, and quoted above; that her authority "is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. To hold the husband liable there must have been some affirmative proof of authority from him, either express or implied, from his acts and conduct"; and cites in support of his position the following authorities: *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; 9 Am. and Eng. Ency. of Law, p. 839, § 3; 1 Bishop on Marriage and Divorce, §§ 556, 558; *MacKinley v. McGregor*, 3 Whart. 369; 31 Am. Dec. 522; *Keller v. Phillips*, 39 N. Y. 351; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384. But in this case, was there no authority in the wife to purchase these goods on the credit of the husband, reasonably "implied from his acts and conduct."

Here, as shown by the evidence, is a husband and wife living pleasantly together; she has no separate estate or business; he is present seeing her purchase, and, as the evidence tends to show, being by her consulted as to the purchase of a large bill of goods; he offers no protest or objection; he gives her his check to assist in making payment, and all this in the presence of the persons to whom he has given notice not to permit her to buy goods on his account without his order, she knowing of such notice having been given. Can no authority be implied from these acts, and this conduct on the part of the husband? Was the wife not justified, and were respondents not authorized to presume authority in the wife from such acts and conduct of the husband? Were the presence, and these acts and conduct, of the appellant, not equivalent to an order from him? We think so. We think, under the circumstances of this case, the appellant is estopped from questioning the authority of his wife to purchase these goods. We think this holding is decisive of this case.

There are other assignments of error. But, from an inspection of the whole record, we are unable to discover any errors that prejudice the appellant. We think the case was tried and determined on its merits, and that the result should not be disturbed.

The judgment and order appealed from are affirmed.

Affirmed.

HARWOOD, J. and DE WITT, J. concur.

STATE EX REL. GLEIM v. EVANS, JUSTICE OF THE PEACE.

[Argued July 17, 1893. Decided July 31, 1893.]

JUSTICE OF THE PEACE—Change of venue.—An application for a change of venue in a justice court, supported by an affidavit making a proper showing, terminates the jurisdiction of the justice for further action other than transferring the cause to another justice.

SAME—Same.—An application for a change of venue in a justice court is made in time when made upon the day to which a case has been continued after a plea of not guilty, but before the trial has commenced.

SAME—Bail and recognizance—Forfeiture.—The forfeiture of a defendant's bail in a misdemeanor case before a justice of the peace for failure to be present at

18	235
13	396
13	399
23*	1010
34*	489
34*	490
13	239
14	526
14	539
23*	1010
37*	98
37*	103
13	239
d23	332

the time of trial, when represented by counsel present, is unwarranted under section 478 of the Criminal Practice Act, providing that the defendant must be personally present before the trial can proceed, as such provision is intended for the protection of the accused, and does not control section 200 of the Criminal Practice Act, providing that if the defendant is charged with a misdemeanor, his personal presence is not necessary, and he may appear, be arraigned, and plead by counsel.

SAME—Same.—A justice of the peace has no authority upon declaring a defendant's bail forfeited to turn over to the county attorney money which had been deposited by the defendant in lieu of a bail bond, but he should certify and return the same to the district court, as required by section 504 of the Criminal Practice Act, in case of the breach of any recognizance.

CERTIORARI—Bail and recognizance.—The proceedings of a justice of the peace in declaring the bail of a defendant forfeited may be properly reviewed on certiorari.

Original proceeding. Application for a writ of *certiorari* to review action of justice of the peace in declaring a defendant's bail forfeited. Orders annulled.

Statement of the case by Mr. Justice Harwood.

This is a writ of *certiorari* for review of certain proceedings heretofore had before J. M. Evans, justice of the peace of Missoula county, in two criminal cases, wherein Mary Gleim, petitioner in this proceeding was defendant, charged with the crime of assault and battery in each of said cases; and it is alleged that said justice exceeded his jurisdiction in certain orders and proceedings therein.

It appears from the return of the justice that on the nineteenth day of January, 1892, complaint was duly made and filed in his court charging said Mary Gleim with the crime of assault and battery in two several instances; whereupon, warrants were issued and executed by the arrest of Mary Gleim, and she was released from custody on deposit of the sum of fifty dollars with said justice of the peace as cash bail, in lieu of the bond required in each of said cases. Thereafter, several continuances were had in each case from time to time, on application of defendant's attorney, S. G. Murray, Esq., until the twenty-fifth day of January, 1892, when defendant appeared in person and entered her plea of "not guilty" to each of said complaints; that both cases were then set for trial on the 26th of January, at two o'clock, P. M. At the time last stated defendant's attorney appeared in her behalf (she not being personally present) and filed and presented to said justice an affidavit for

change of venue in the case first called for trial, which affidavit was subscribed and sworn to by defendant, and reads as follows:

"Mary Gleim, being duly sworn, deposes and says that she is the defendant in the above-entitled action; that she has reason to believe and does believe that she cannot have a fair and impartial trial before the justice of this court for the following reasons: About two years ago this affiant and the above-named justice had a personal difficulty, in which there were such hard feelings engendered on the part of said justice against this defendant that he has ever since that occurrence held a personal enmity against her, and has upon numerous occasions shown by his conduct, both as a citizen and as an officer of this court, that he has a personal grudge against this affiant; that affiant is informed, and believes, and therefore affirms, that the said justice has recently said to numerous persons that he was prejudiced against her. Affiant therefore prays that this cause may be transferred to some other court of concurrent jurisdiction, there to be heard and tried upon its merits. Affiant further affirms that this application for change of venue is not made for the purpose of delay, but that substantial justice may be done."

Upon this affidavit, defendant, by her attorney, then moved said justice's court to order said case transferred to another justice of the peace for trial, as provided by law in such cases; but the justice overruled said application for a change of venue; and thereafter, on the same day, at ten minutes past three o'clock, P. M., the defendant, not being personally present, but her counsel being present and representing her, the court, on motion of the attorney for the state, made an order declaring defendant's bail deposited in each of said cases forfeited, and thereupon ordered the city marshal to produce defendant in person in court forthwith; which requirement was complied with, as recited in the record, "by defendant appearing in court, in company with the city marshal, C. R. Prescott." Whereupon, the trial of one of said cases first called ensued before said justice of the peace, and a jury impaneled at the request of defendant; which trial resulted in a verdict by the jury finding defendant guilty, and assessing a fine of twenty-five dollars and costs as her punishment, which she satisfied by payment.

The other case was continued until the following day, January 27th, at two o'clock, P. M., and her cash bail of fifty dollars theretofore deposited in that case having been declared forfeited, the justice ordered that defendant "should give bond for appearance before him on the twenty-seventh day of January, 1892, at two o'clock, P. M. The defendant then and there deposited the sum of five hundred dollars in cash as bail for her appearance at the time last stated, in lieu of the required bond. On January 27th counsel for defendant appeared and presented a motion for a change of venue, supported by affidavit of defendant containing affirmations substantially as set forth in the affidavit above recited. But it appears the justice then and there "overruled said motion, upon the ground that the affidavit and all thereof was false and untrue"; and the defendant, not having appeared in person at fifteen minutes past three o'clock, P. M., of said day, when the case was called for trial her default was entered, and the attorney prosecuting "moved the court that the bail bond for the appearance of defendant be forfeited. S. G. Murray, attorney for defendant then offered to proceed to trial without defendant being in court, which was by the court refused, and the motion to forfeit the bail so given, as aforesaid, was sustained by the court, and said cash bail in the sum of five hundred dollars, deposited in lieu of the bond, was ordered by the court to be forfeited, and the city marshal ordered to produce the defendant in court forthwith." At half past three of said last-mentioned day the defendant appeared in court in custody of the city marshal, and the trial proceeded before the court, sitting with a jury demanded by defendant; which trial resulted in a verdict returned by the jury finding "defendant guilty of assault, and fixing her fine in the sum of five dollars and costs."

It appears that the fine and costs assessed against defendant in each of said cases were paid by her without further proceeding. And that thereafter on the tenth day of February, 1892, counsel for defendant appeared and moved said justice to certify the cash bail deposited in lieu of a bail bond to the district court. The return of respondent recites that "said motion was denied, for the reason that said money had been paid to the county attorney of Missoula county." The return

also sets forth that, at certain times said bail money declared forfeited had been paid to said county attorney.

Upon this record, it is insisted by petitioner's counsel that the action of said justice in declaring the forfeiture of said bail deposited by defendant was in excess of his jurisdiction: 1. Because said justice had lost all jurisdiction of said cases by the filing of the affidavit and the demand for change of venue, as shown by the record, and therefore all proceedings taken by said court after the presentation of said affidavit and application for change of venue, were in excess of said justice's jurisdiction, void, except such as were voluntarily acquiesced in by defendant, and ought to be annulled; 2. That said orders of forfeiture of the bail money deposited by defendant were in excess of the jurisdiction of said justice, because defendant in said criminal cases was present by her counsel, who was personally in court, offering to represent her in any lawful proceeding of the court in either of said cases, and therefore, on the admission of respondent in his return, there were no facts existing to warrant the order of the court forfeiting said bail.

E. W. Toole and Albert I. Loeb, for Relator.

Henri J. Haskell, Attorney General, for Respondent.

HARWOOD, J.—Petitioner was entitled, under the provisions of the law, to a change of venue, on the affidavit and application presented, and therefore, Justice Evans had no jurisdiction to proceed further, after the presentation of said affidavit and application for removal of said cases to another justice of the peace. His jurisdiction was terminated by that proceeding. It appears to be conceded that the showing was sufficient to entitle petitioner to a change of venue, but the attorney general objects, on behalf of respondent, that the application for a change of venue was not made in time, because the case had been set for trial. This position, however, cannot be sustained. The case had merely been continued to a certain day, and it cannot be maintained that the trial had commenced, in any sense, when the applications for change of venue were made. (Murfree on Jurisdiction of Justices, sec. 502.) The statute clearly contemplates that if the application be made before the

trial is commenced, it is in time, and the statute provides that the application for removal of the case to another justice may be made after a jury has been called for. (Com. Stats., § 780, p. 262.) But in the case at bar a jury had not even been demanded when the application was presented. It follows that all proceedings in said case taken by said justice of the peace, after application for change of venue, were in excess of his jurisdiction, because, by that event, his jurisdiction for further action, otherwise than transferring said cause to another justice of the peace, as provided by law ceased. (*People v. Hubbard*, 22 Cal. 35; *Herbert v. Beathard*, 26 Kan. 746; *Hellriegel v. Truman*, 60 Wis. 254; *Jenkins v. Morning*, 38 Wis. 199; *State v. Clayton*, 34 Mo. App. 563.)

On the second point raised by petitioner's counsel we are also unhesitatingly of opinion, that, under the facts set forth in the return of respondent, his action in declaring the bail money deposited by defendant forfeited was unwarranted, and in excess of his jurisdiction, and therefore must be annulled. Defendant was charged in each case with acts amounting to a misdemeanor. The Criminal Practice Act provides, in section 200, that if the defendant is charged with a misdemeanor, "his personal presence is not necessary, and he may appear, be arraigned, and plead by counsel"; and while section 478 of the Criminal Practice Act, especially pertaining to prosecutions in justice's courts, provides that "defendant must be personally present before the trial can proceed," we do not think the latter provision, in view of others, was intended to be so construed and applied so as to work injury to defendant. Its purpose was to provide that before the trial could proceed, jurisdiction of the person of defendant must be acquired by his arrest and arraignment, whereby he would be informed of the charge preferred against him, and would be put upon notice to obtain counsel, and prepare for his defense. And if defendant is held in custody, the requirement is, to bring him in to be present at the trial, and not proceed in his enforced absence. But if the defendant has furnished the required bail for his appearance, and to answer any judgment that might be rendered against him, and he is at liberty to attend his trial, and has counsel present to represent him, and the judgment is

promptly satisfied, we are fully of the opinion there would be no ground to warrant the forfeiture of the bail, under such circumstances, and such were the circumstances under which the order was made declaring the bail forfeited in the proceeding under review. (*State v. Rickards*, 21 Minn. 47.) Such a ruling would turn a law, undoubtedly made for the protection and benefit of the accused, to his disadvantage and oppression.

It should be further observed that the justice also exceeded his jurisdiction in undertaking to make disposition of said bail money in such a summary manner, as recited in his return, for the law plainly provides, in section 504 of the Criminal Practice Act, that "in case of the breach of any recognizance entered into as aforesaid, the same shall be certified and returned to the district court, to be proceeded on as recognizances certified to such court by magistrates." In this instance, the money deposited by defendant, coupled with the conditions provided by law, was her recognizance.

Respondent's counsel objects that the writ of *certiorari* is not the proper remedy to review said proceedings of the justice, because appeal to the district court is provided, in favor of defendant, in case of conviction. The appeal provided for in such cases takes the case into the district court for trial *de novo* of the issues involved. In this case the issue involved is whether or not defendant is guilty of assault, as charged in the complaint, and put in issue by her plea of "not guilty." Such issue in no way involves the action of the justice of the peace in declaring forfeited the bail money deposited by defendant. Besides, defendant submitted to the fine, and therefore there was no case for appeal on her part. Nor would such appeal, under our practice, for trial *de novo*, afford any relief against the action of the justice in retaining said case and proceedings therein, after demand for change of venue. If it be true, as shown by the authorities, and held above, that the detention of said case, and further proceedings therein by Justice Evans, was unauthorized, and in excess of his jurisdiction, the appeal for retrial of the issues involved in the case would in no way give the petitioner relief against said acts of the justice, in excess of his jurisdiction. The appeal would rather involve a submission to such action, as though it was fully

within the justice's jurisdiction. The authorities are against the proposition of respondent's counsel, that this proceeding for correction of excessive action of the justice of the peace is improper practice. (See cases cited *supra*, and especially *State v. Clayton*, 34 Mo. App. 563, and *Combs v. Dunlap*, 19 Wis. 591; *Withington v. Southworth*, 26 Mich. 381.)

For the foregoing reasons, it is ordered that the order of the justice of the peace, declaring forfeited said sums of money, amounting to six hundred dollars, deposited in said cases by defendant, as bail for her appearance, and to answer any judgment that might be rendered against her in said actions, are hereby set aside and annulled.

PEMBERTON, C. J., and DE WITT, J., concur.

18 246
18 401
33^a 688
34^a 180

18 246
15 427
33^a 688
39^a 322

STATE, APPELLANT, v. CARROLL ET AL., RESPONDENTS.

[Submitted July 17, 1893. Decided July 31, 1893.]

CRIMINAL LAW—Burglary—Intent.—On trial for burglary, where an entry with intent to steal an overcoat is charged against two defendants, an instruction that the state must prove that each defendant had the intent to steal the specific coat when entering the store, that if one defendant had such intent and the other did not, the one not having such intent at the time of entering should be acquitted, is proper. (*Territory v. Duncan*, 5 Mont. 478; *Territory v. Wullard*, 8 Mont. 328, cited.)

Appeal from Seventh Judicial District, Custer County.

Burglary. The defendants were tried before MILBURN, J. Affirmed.

Statement of the case by the justice delivering the opinion: This is an appeal by the state. The defendants were acquitted. The state excepted to an instruction given by the court, and, reserving the question of law, now prosecutes this appeal. (Criminal Practice Act, § 396.) The information was for burglary. The charging part of the information is as follows: "That the said John Carroll and Edward Evans did then and there the store building of Isaac Orschel and Herman Orschel, feloniously break and enter, with the intent the goods and chattels of said Isaac Orschel and Herman Orschel, in the said store building then being found and more particularly

described as one overcoat, of the value of thirty dollars, feloniously and burglariously to steal, take, and carry away."

The court, upon the trial, among other instructions, charged the jury as follows: "The court instructs you that the state must prove that the defendants, and each of them, had the intent to steal the specific coat when entering the store. . . . If one defendant had such intent, and the other did not, when entering said store, the one not having such intent at the time of entering should be acquitted."

It is this instruction which the state assigns as error.

Ella L. Knowles, C. H. Loud, and Henri J. Haskell, Attorney General, for the state, Appellant.

Middleton & Light, for Respondents.

DE WITT, J.—The counsel for the state filed an elaborate brief, supported by authorities, to the effect that in proving the burglary it is not necessary to prove the actual commission of the offense, such as larceny or robbery, etc., which the defendant intended to commit, when he made the entering or breaking of the building, but that it is only necessary to prove the defendant's intent to commit one of the crimes named in the statute when he made the entry.

But that is not the point in this case. To constitute burglary there must be the entry with the intent to commit grand or petit larceny, or any felony. (Criminal Practice Act, § 73.) The entering, and such intent, are two elements going to constitute the offense of burglary. (*Territory v. Duncan*, 5 Mont. 478; *Territory v. Willard*, 8 Mont. 328.)

This case is determinable by observing what intent was charged in the information. It is found that the intent there charged was to commit the petit larceny of a certain overcoat. No other intent is charged. The information does not allege the intent to commit the larceny of any other goods whatever than this particular overcoat, nor does it charge the intent to commit any felony. If the intent to steal the overcoat were absent, then no intent to commit grand or petit larceny, or any felony, is charged by the indictment. The court was, therefore, wholly correct in charging that, under this indictment,

alleging, as it did, no intent whatever, except to commit the larceny of the overcoat, that such particular intent must be proved in order to convict the defendants. The judgment is therefore affirmed.

Affirmed

PEMBERTON, C. J., and HARWOOD, J., concur.

18	248
16	669
13	248
40	336

STATE, RESPONDENT, v. LEE, APPELLANT.

[Submitted June 29, 1893. Decided, July 31, 1893.]

CRIMINAL LAW—Evidence—Testimony of absent witness.—Under the constitution (art. III, § 16) and the Criminal Practice Act (§ 9) the accused, in a criminal prosecution, is entitled to meet the witnesses against him face to face, and it is therefore error in a criminal trial, where the prosecuting witness was not within the state, to admit in evidence the committing magistrate's general recollection of the testimony which such witness gave at the preliminary examination.

Appeal from Fourth Judicial District, Missoula County.

Conviction for larceny. The defendant was tried before WOODY, J. Reversed.

Statement of the case by the justice delivering the opinion: The appellant, the defendant, appeals from a judgment rendered upon a conviction on the charge of grand larceny. Upon the trial the prosecuting witness was absent. His name was Charles Peterson. He was the person who owned the money which was the subject of the larceny, and from whose possession it was taken. The state offered testimony to show that said Peterson was not within the jurisdiction. John Nelson, a witness for the state, produced a letter, which he identified as the handwriting of Peterson, written from San Francisco, in which said Peterson stated he was going to Australia at once, and would sail before the letter would reach its destination. The state also produced a subpoena for said Peterson, with its return to the effect that said witness could not be found. The court then held that the absence of the witness was sufficiently shown to allow the admission of the evidence given by that witness against the defendant, upon a

preliminary examination upon this charge, held by the magistrate, J. M. Evans, Esq. The testimony of this witness Peterson was not taken in writing before the magistrate. He testified that he was the magistrate who held the preliminary examination of this defendant, charged with the offense of grand larceny, for which she was then being tried. He testified that this witness, Peterson, testified on that examination that the defendant was present in court at the time, and was represented by counsel. Said Evans said that he had a general recollection of the evidence given before him by the witness Peterson. The court then allowed Evans to recite from his memory what the witness Peterson had testified before him, Evans, on the preliminary examination. The testimony of Peterson, which Evans so recited, was as to the material facts of the larceny. To all these proceedings the defendant, by her counsel, duly objected, that the testimony given against defendant was hearsay testimony, and should not be narrated by the witness Evans, but that the defendant is entitled to be faced by the witness Peterson. The objections were overruled. The testimony was given, as above recited, and the defendant was convicted. The allowance of this testimony of Evans is presented by the appellant as error.

Murray & Musgrave, for Appellant.

Ella L. Knowles, and Henri J. Haskell, Attorney General, for the state, Respondent.

DE WITT, J.—Section 16, article III, of the constitution, is in part as follows: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face."

We find in the Criminal Practice Act the following provisions: "SEC. 9. In a criminal action the defendant is entitled: 3. To produce witnesses in his behalf, and to be confronted with witnesses against him, in the presence of the court."

In this case this constitutional and statutory right of defendant was wholly denied.

As appears in the statement of the case above, material evidence was produced against the defendant, not from the mouth of the witness of the facts (which witness was out of the jurisdiction), but from the mouth of a witness who purported to relate his general recollection of what the witness of the facts had testified on the preliminary hearing before the committing magistrate. The provisions of the constitution and the statute, above cited, seem to have been overlooked. (Const., art. III, § 16; Crim Prac. Act, § 9.)

The state makes no appearance, and files no brief in this case.

Among other authorities presented by appellant, we note as particularly in point as to their facts, the following: *Bergen v. People*, 17 Ill. 426; 65 Am. Dec. 672; *United States v. Angell*, 11 Fed. Rep. 34.

The judgment is reversed, and the case is remanded for a new trial.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

HORSKY, RESPONDENT, v. MORAN, APPELLANT.

[Argued September 26, 1892. Decided September 5, 1893.]

~~JUDGMENT ON THE PLEADINGS—Adverse possession—Quiet title.—Plaintiff is not entitled to judgment on the pleadings in an action to quiet title to a fractional piece of land discovered by a later survey to lie between lots, which by the survey under which he purchased were contiguous, where the complaint, while alleging adverse possession of certain land from the time of his purchase, leaves it obscure as to whether such fractional piece was included, and to determine which would require the construction of certain deeds; and the answer, while admitting that the land occupied by plaintiff had been so occupied for more than five years, denied that his possession of the fractional piece was adverse or was taken under the deeds of his predecessors in interest or in any manner except in subordination to the legal title, which was in the probate judge in trust for defendant.~~

Appeal from First Judicial District, Lewis and Clarke County.

Action to quiet title. Judgment on the pleadings in favor of plaintiff was rendered by BUCK, J. Reversed.

13	250
16	378
17	471
18	250
31	366

Statement of the case by Mr. Justice HARWOOD.

Judgment was rendered in favor of plaintiff on the pleadings, and therefore, first of all, irrespective of the questions of law, we must ascertain from an examination of the allegations of the complaint, and the denials and averments of the answer, whether any material issues of fact are raised by the answer, as contended by appellant, for, if such issues are raised, judgment on the pleadings would not be proper. The complaint and answer are somewhat elaborate, and in quite compact narrative form. Therefore, in order to scrutinize each allegation and denial distinctly, we will set the same down in the order alleged, and number them for reference.

The complaint alleges: 1. That on February 17, 1875, plaintiff acquired ownership and possession of lot 20, block 37, fronting "37 feet, more or less, on Main street," and running back 90 feet, more or less, to and bounded on the east by Jackson street, on the north by lot 21, and on the south by lot 19. 2. That on the 7th of May, 1874, plaintiff became the owner of lot 18, same block, "being 31 feet, more or less, on said Main street," and bounded on the east by Jackson street, on the north by lot 19, and on the south by lot 17. 3. That on the same date (May 7, 1874) plaintiff became the owner and in possession of lot 19, same block, fronting "35 feet, more or less, on said Main street," and bounded on the east by Jackson street, on the north by lot 20, and on the south by lot 18. 4. "That on said last-named date (May 7, 1874) plaintiff also became the owner and possessed of a fractional piece of ground, should the same be so regarded, situate between said lots numbered 19 and 20, in said block, containing 21.05 feet, more or less, on said Main street, and extending back to said Jackson street." 5. That on May 6, 1874, plaintiff became the owner and possessed of lot 17, same block, "being 34 feet, more or less, on said Main street," and bounded on the east by Jackson street, on the north by lot 18, and on the south by lot 16; all of said land being in Helena townsite, Lewis and Clarke county, Montana. 6. "That in truth and reality the said lots owned and possessed by plaintiff and his predecessors in interest comprised 161 feet frontage on Main street, and running back to said

Jackson street, according to the original, established, and recognized boundaries of said lots." 7. "That according to an accurate measurement thereof the said lots exceeded the number of feet designated in the deed therefor by M. F. Truett, then probate judge of the county aforesaid, 21.05 feet; that according to the said lots and boundaries thereof, according to the calls in said deeds from said Truett, as such probate judge, no excess whatever existed; and that the title and possession of plaintiff and his predecessors in interest was acquired and obtained accordingly, and on account whereof the said lots, pieces, or parcels of land, and the dimensions thereof, were governed and controlled by the said boundary line so established and recognized by plaintiff and his predecessors in interest." 8. That immediately upon becoming the owner of said lots plaintiff went into possession of said 161 feet of ground fronting on said Main street, running back, etc., "and ever since, him and his tenants and agents have been in possession of the same." 9. That since, and long prior to, the year 1885 said premises have been inclosed by a good and substantial fence, and houses erected thereon continuously, actually occupied and possessed, as aforesaid. 10. "That the lot, piece, or parcel of land described in the deed hereinafter mentioned to said defendant, and claimed by him, is inside of the inclosure of plaintiff, and is part and portion thereof so inclosed since 1874." 11. "That said defendant, or no other person, except those claiming under plaintiff, and this plaintiff, have been in the seisin or possession of any part of said 161 feet of ground so inclosed as aforesaid." 12. "That for more than five years continuously and uninterruptedly prior to the obtaining by defendant of the deed hereinafter mentioned and the institution of this action, this plaintiff and his tenants, and those claiming under him, have had said premises and that portion thereof so deeded to and claimed by plaintiff, in actual possession, by means of substantial feuces and inclosures, and the actual occupation and use thereof have been open, hostile, and notorious, and possession taken under the deeds of the predecessors in interest of this plaintiff." 13. That on August 20, 1873, Robert S. Hamilton, one of the grantors of plaintiff, being then in possession and actual occupation of said lots 18 and

19, in the block aforesaid, by inclosures thereof by substantial fences, according to the established and recognized boundaries thereof, "finding that the same, by actual measurement, exceeded the number of feet called for in the deeds, therefore, and for the purpose of avoiding trouble or contention concerning the same, duly made his application to the probate judge for the entry of said excess of ground according to the actual measurement, for the entry of and deed for the said portion of lots 19 and 18 so designated as a fraction aforesaid; that the same was done while the said Robert S. Hamilton was so in possession and actual occupation of said lots." 14. "That at the time of said application the said Robert S. Hamilton offered to pay and tendered said probate judge the fees and maximum price of said fraction, on account whereof he became and was, in equity and good conscience, the owner of and entitled to a deed to said premises or fraction, if any there be, and all of which was done for the purposes aforesaid, and without any intention of abandoning his title, according to the established and recognized boundaries of said lots 19 and 18." 15. "That this plaintiff, being the grantee of said Robert S. Hamilton, and succeeding to all his rights and equities in the premises, on the 15th of December, 1888, petitioned said probate judge to convey to this plaintiff the said alleged fractional lot so applied for by said Hamilton, and in pursuance of said petition and the application of his grantor, as aforesaid, said probate judge, on the date aforesaid, and while plaintiff was so in the possession and occupation of said premises as such grantee, made, executed, and delivered to plaintiff a deed for said premises." 16. "That notwithstanding the said ownership and possession by him had and held of said lots 17, 18, 19, and 20, and the alleged fractional portion thereof, the said defendant made his petition and application for a portion thereof so in plaintiff's inclosure as aforesaid, and, by his false and fraudulent representations in reference thereto, obtained from said probate judge a deed for a certain lot, piece, or parcel of land so embraced in said inclosure, to wit, said lot numbered 31, in block 37, of the Helena townsite, according to the official survey approved September 12, 1885; that said deed is executed in due form of law, and has been ever since its execution, and

is now, of record in the office of the county clerk and recorder of said county of Lewis and Clarke, state of Montana, and casts a cloud upon the title of plaintiff, greatly to his damage and injury." And upon those allegations plaintiff demands that title to said fraction be adjudged in him, and that defendant's deed therefor be canceled.

The answer to this complaint contains the following denials and affirmations: 1. Denies, on information and belief, that the several lots mentioned in said complaint, of which plaintiff alleges ownership, "as the same exist, and were shown upon the original plat of said townsite in 1874-75, or for more than ten years thereafter, occupied the same position on the earth's surface as the position of the same named lots and block did at the date of the commencement of this action, and as they now occupy." 2. Denies, on information and belief, "that prior to September 12, 1885, the position of the bounding streets named in said complaint, to wit, Jackson street and Main street, were, according to any official survey or plat of said townsite, in the same position on the earth's surface as they have been since September 12, 1885." 3. Denies the allegation that "said defendant, or any other person except those claiming under plaintiff, or said plaintiff, have since 1874 been in the seizure or possession of any part of the 160 feet of ground mentioned in said complaint as being inclosed." 4. Admits that the land occupied by plaintiff herein had been so occupied by plaintiff for a period of more than five years prior to the commencement of this action, but denies that such occupation, in so far as it relates to lot 31, block 37, was open, hostile, or notorious, or was adverse, or could be adverse, and denies that said possession thereof was taken under the deeds of the predecessors in interest of said plaintiff, or in any other manner than in subordination to the legal title of said land, which defendant alleges was and remained in the probate judge, in trust for this defendant, and none other, until the eleventh day of December, 1888." 5. Denies that "said land had ever, prior to September 12, 1885, been officially platted, known, and designated as 'Lots 17, 18, 19, and 20,' and denies that there was, prior to September 12, 1885, any space, lot, piece, or parcel or fraction of land lying or existing between lots 19

and 20, block 37, or between either two or any of said lots numbered 17 to 21, and, on the contrary, alleges that prior to September 12, 1885, according to the official plat of said town-site, then existing, the said named lots, to wit, 19 and 20, were adjoining lots, and consisted of no more or less than the number of feet frontage than as shown on said plat then existing, or then expressed in the deeds to the predecessors in interest of said plaintiff." 6. "Denies that in truth or in reality, or in any other manner, the lots mentioned in said amended complaint as numbered 17, 18, 19, and 20, as being owned by plaintiff herein, composed or included 161 feet frontage on Main street, and running back to Jackson street, according to the original, established, and recognized boundaries, and denies that according to an accurate measurement said lots exceed the number of feet designated in the deeds therefor by M. F. Truett, the probate judge of the county aforesaid, 21.05 feet, or any other number of feet." 7. Defendant "admits that according to the calls of said deeds from said Truett, as such probate judge, no excess whatever existed, and admits that the title of plaintiff and his predecessors in interest was required and obtained accordingly, but denies that possession was taken accordingly, and denies that on account thereof, or any other account, as a question of law, or as a question of fact, the said lots, pieces, or parcels of land, or the dimensions thereof, were governed or controlled by any acts of plaintiff or his predecessors in interest, or by any other thing than the then existing plat, and the identical portion of the earth's surface, as shown and delineated thereon, and as expressed in said deeds, of which said plat constituted a necessary part; said plat being the original official plat, known as the 'Wheaton Plat,' which was approved January 7, 1869, and is now on file in the office of the county recorder of Lewis and Clarke county, Montana." 8. Denies that Robert S. Hamilton did, on the 20th of August, 1873, or at any other time, tender or offer to pay to the probate judge his fees or maximum price for any fraction, for the reason, as hereinbefore stated, to wit, that there was no fraction existing, under or according to any existing plat or survey, and denies that any such offer or tender for a thing not in *esse* would constitute the said Hamilton or his successors, either in

law or in equity or good conscience, or in any other manner, to be the owner of, or entitle him or them, or the plaintiff herein to a deed for the premises at all." 9. "Defendant alleges that at the date of the entry of said townsite, March 2, 1869, being the date when the probate judge made entry of said townsite in the United States land office at Helena, Montana, in trust for the several use and benefit of the occupants, defendant was, and for a long time prior thereto had been, and for a long time subsequent thereto remained, in the actual, *bona fide*, and sole occupation, possession, and enjoyment, and residing upon a certain tract of land within the townsite of Helena, as so entered by said probate judge, and that a portion of said tract of land so occupied by this defendant was and is the same, and then included, and now includes, the whole of the identical tract of land described in defendant's deed therefor, as lot numbered 31, of block 37, of the townsite of Helena, according to the official plat and survey of said townsite of Helena, as approved September 12, 1885." 10. "Alleges that prior to the approval of said official plat, September 12, 1885, there was no official plat in existence which showed the land occupied by this defendant at the date of the entry of said townsite, and as described in defendant's deed therefor, in such manner and form as that defendant could by any possibility make an application therefor, as one of the beneficiaries of the trust imposed on the probate judge by reason of the entry and patent from the United States for said townsite, and alleges that from and after the approval of said official plat, September 12, 1885, until the time when this action was commenced, no notice of the approval of said plat; or that said land was and had been platted and surveyed, so that the deed for said lot could be issued, was published, or in any other manner given, as required by section 2015 of the Compiled Statutes of Montana; and defendant alleges that prior to said September 12, 1885, the only plat in existence, of said townsite, was one constructed by A. C. Wheaton in 1868, and approved by the county commissioners of Lewis and Clarke county, January 7, 1869, the same having been constructed and approved prior to the entry of said townsite, and which said so-called plat, not having been made in accordance with the actual loca-

tion of claimants, occupants, and owners, represented Main street and Jackson street, being the bounding streets of the land in dispute herein, as running at a different angle to the exterior boundaries of said townsite, and in a different position on the earth's surface, from the position of said streets as governed by actual occupancy, as such occupancy is shown by the said official plat approved September 12, 1885, whereby and by reason whereof the land claimed by plaintiff herein under the title and description cited in said amended complaint, if anywhere, is not the same land or portion of the earth's surface as that of which defendant is the owner by reason of his deed dated December 11, 1888." 11. "Defendant further alleges that, at the date of the entry of said townsite by the probate judge of Lewis and Clarke county, defendant had a dwelling-house upon, was living therein, and solely and exclusively occupying, the land described in his deed as lot number 31 of block number 37, according to said official plat approved September 12, 1885, and never since has he alienated the title thereto to any other person or persons whomsoever, and that he is now the owner and entitled to the possession thereof." 12. "And further alleges that between the date of the entry of said townsite until the said eleventh day of December, 1888, the title to said lot number 31, block 37, being the land in dispute herein, remained in the probate judge of said Lewis and Clarke county under and by virtue of the trust imposed on him by reason of the patent from the United States for said townsite." 13. "Defendant admits that on the fifteenth day of December, 1888, the probate judge of Lewis and Clarke county, Montana, did issue an instrument in writing, purporting to be a deed, executed in due form of law, to the plaintiff herein, for lot number 31, block 37, according to the plat and survey approved September 12, 1885, but denies that said deed was for that portion of the earth's surface described in said amended complaint as being a fraction of, or as part of, the original lots 17, 18, 19, and 20 of block 37, or either of said lots, according to, or as the same was delineated on, any plat, or as shown by any survey existing prior to September 12, 1885, and which is now or ever was recognized or approved as an official survey or official plat, and made under

any authority of law, but on the contrary alleges that said purported deed is for, and purports to convey unto plaintiff herein, the said lot 31, the property of this defendant; and defendant alleges that said deed issued and executed in due form of law December 15, 1888, unto the plaintiff herein was wrongfully and unlawfully issued, the title of said lot at that date being and still remaining, rightfully and lawfully, in this defendant, and the same casts a cloud upon this defendant's title to said lot number 31 in block 37." 14. "Defendant denies that, by reason of any false or fraudulent statement or representation made to the probate judge, he obtained a deed for said lot 31, but, on the contrary, alleges that all statements, affidavits, and proofs made to said probate judge by this defendant and by his witnesses, in making application therefor, were truthful, and strictly in accordance with facts, and that said deed to this defendant was issued rightfully and lawfully, and in strict conformity to the authority conferred by law upon, and according to the requirement of the trust imposed upon, the said probate judge by act of Congress authorizing the grant of said town-site, and by the terms of the patent of the United States issued to him for that sole purpose, and denies that said deed casts a cloud upon the title of plaintiff, or of any other person, to his damage or injury, greatly or otherwise." 15. "And defendant, for further defense, says that plaintiff is estopped from claiming that he has held said lot number 31 adversely to this defendant, or adversely to the true legal title, because he says that on the said fifteenth day of December, 1888, the said plaintiff did apply to and receive from said probate judge, of Lewis and Clarke county aforesaid, the deed hereinbefore mentioned for said lot, and ever since has been, and yet claims to hold the same, under and by virtue of said deed." 16. "And defendant demands that the deed obtained by plaintiff of the premises in dispute, from the probate judge, of date December 15, 1888, be canceled, and that judgment confirm defendant's alleged title to said premises, claimed by virtue of the facts set forth in the answer.

Sanders, Cullen & Sanders, and Comly & Foote, for Appellant.

The plaintiff is not entitled to judgment on the pleadings if the answer contains a denial of the material facts alleged as a

cause of action in the complaint, and a special defense is stated separately, even if the entire cause of action is confessed in the special defense. (*Nudd v. Thompson*, 34 Cal. 39.) Motions for judgment on the pleadings can be allowed only where the answer fails to deny any material allegation of the complaint. (*Wilson v. McDonald*, Cal. Sup. Ct. (July T. 1869); 3 Estee's Pleadings, 381.) A verified answer which in any part contains a distinct denial of a fact material to plaintiff's recovery cannot, whatever its effects, be treated as a nullity so as to entitle plaintiff to judgment on the pleadings. (*Ghiradelli v. McDermott*, 22 Cal. 539.) The question of adverse possession, and the extent of the same are questions for the jury. (Angell on Limitations, §§ 390, 398.) Where the party is in possession, with or without color of title, claiming in subordination to the legal title, or holding so by virtue of his admissions and acts, he is estopped from denying the title of the real owner; and these admissions and acts must be determined by the jury; they are questions of fact, and not for the court to determine. (Angell on Limitations, pp. 390 to 398 inclusive.)

Toole & Wallace, for Respondent.

HARWOOD, J.—It must be borne in mind, during all this consideration, that said fractional piece of land is the point of controversy—the only land in dispute—in this case. The allegations of the complaint respecting the acquisition and possession of lots 17, 18, 19, and 20, however material, are facts environing the real point of controversy. It will be observed by reading those allegations of the complaint contained in paragraphs 1 to 6 of the above statement that plaintiff alleges the acquisition of lots 20, 18, and 19, particularly alleging the boundaries of each lot, and averring that lot 20 is bounded on the south by lot 19, and, in describing lot 19, alleging that it was bounded on the north by lot 20. According to these allegations, taken in the ordinary meaning of terms, said two lots are alleged to directly adjoin one another, and there would be no room for a fraction between them. It is next alleged (paragraph 6 of the above statement) that in truth and reality said lots comprise a frontage on Main street of 161 feet, running back to, etc., "according to the established and recognized

boundaries of said lots. By this it is evidently intended that said lots, as described, "according to the original, established, and recognized boundaries," include said fraction, for it will be noticed, by referring to the particular allegations as to the frontage of each described lot on Main street, said lots 17 to 20 inclusive, comprise a frontage on Main street of 137 feet, not including the fraction; but, including said fraction of 21.05 feet, such frontage, according to the specific allegations of the complaint, amounts to 158.05 feet on Main street. So that by the allegation "that in truth and reality said lots," etc., "comprised 161 feet frontage on Main street," it must be intended to include said fraction as part of said lots; that is, that said lots, according to the numbers as platted, constitute 161 feet frontage, and necessarily include the fraction. But the next allegation (paragraph 7 of the statement above) sets forth that, by measurement, according to the "number of feet designated in the deeds therefor," said lots do not include said fraction of 21.05 feet, but that "according to said lots and boundaries thereof, according to the calls of said deeds from said Truett, probate judge, no excess whatever existed," and that "the title and possession of plaintiff and his predecessors in interest was acquired and obtained accordingly, and on account whereof said lots, pieces, or parcels of land, and the dimensions thereof, were governed and controlled by said boundary lines so established and recognized by plaintiff and his predecessors in interest."

Whether it is meant by this "that title and possession of plaintiff and his predecessors" was taken according to number of feet frontage which said deeds called for, not including the fraction, or whether "title and possession of plaintiff and his predecessors" was claimed and taken according to the other "calls of said deeds" which plaintiff alleges would include said fraction, is not clear, nor is it made any more clear by the allegation that "on account whereof the said lots, pieces, or parcels of land, and the dimensions thereof, were governed and controlled by said boundary lines so established and recognized by plaintiff and his predecessors in interest," because the last averment shows nothing more than that plaintiff and his predecessors contended that the boundaries were governed and controlled by lines established and recognized by them. And

the same obscurity appears in the allegation of the complaint found in paragraph 12, as numbered in the above statement, where it is averred that for more than five years, continuously, plaintiff and his tenants, etc., and those claiming under him, "have had said premises, and that portion thereof so deeded to and claimed by plaintiff, in actual possession, by means of substantial fences and inclosures."

The question arises here, what "land was so deeded to and claimed by plaintiff" in accordance with said deeds? He alleges that he was in possession and occupation of the land "so deeded." It would seem that the deeds would have to be construed (and construed in the light of evidence showing the real facts concerning said lots and fraction, according to the original plat, and any change in position thereof, and boundaries made by the subsequent plat of 1885, alleged in plaintiff's complaint, if any such change was made, section 632, Code of Civil Procedure), in order to ascertain what was deeded to plaintiff and his predecessors. Plaintiff himself alleges that, according to certain terms of the deeds, they did not convey said fractional piece of ground, but according to the "calls of the deeds" the fractional piece would be included.

Is the court to understand from the allegation of paragraph 12 (above statement), that "for more than five years, continuously and uninterruptedly, prior to the obtaining by defendant of the deed hereinafter mentioned, and the institution of this action, this plaintiff and his tenants, and those claiming under him, have had said premises," including said fraction, or all of 161 feet frontage, "in actual possession, by means of substantial fences and inclosures, and the actual occupation and use thereof has been open, hostile, and notorious, and possession taken under the deeds of the predecessors in interest of plaintiff"? If that is what the pleader intended, it seems far from what he alleges, because he alleges that plaintiff, his tenants, etc., "have had said premises, and that portion so deeded to and claimed by defendant, in actual possession," etc. The premises so deeded to plaintiff may include said fraction, or may not, according to the construction put upon the deeds; and so it may be true that plaintiff has had said lots so deeded inclosed, and held hostile and notorious adverse possession

thereof, without holding hostile or notorious adverse possession of said fraction.

Again, in paragraph 13, as set forth in the above statement, the same peculiarities of averment are observable; that is to say, it is alleged that Hamilton, one of plaintiff's grantors, was in possession and actual occupation of said lots 18 and 19. Now, if the pleader intends by this that the said Hamilton was in actual possession and occupation of said lots and fraction, or said lots including said fraction, why not so allege in plain terms? As we have seen, the lots, according to the number of feet frontage, or according to the "calls of said deeds," may or may not include said fraction, this depending upon the construction of the deeds. Paragraphs 9 and 10 of plaintiff's complaint, as numbered above, allege that said premises have been since 1874 inclosed and "inside of the inclosure of plaintiff," but these paragraphs do not aver adverse possession on the part of plaintiff. It is further observed that in the commencement of the complaint plaintiff alleges that the fraction in dispute lies between lots 19 and 20, whereas in paragraph 13, as numbered in the above statement, the fraction is alleged to be between lots 18 and 19.

Of course, such obscurities, and even errors and inaccuracies, might be cured by a trial, and findings of fact as a result of the trial; but, where judgment is demanded on the pleadings, it is our duty to scrutinize the allegations and denials with great care and caution.

Now, as to defendant's answer, the first and second paragraphs, as set forth above, are in the form of denials, but, in substance, are allegations of new matter not touched upon in the complaint. These paragraphs introduce for the first time the affirmation that, by the second survey and plat of said townsite made in 1885, said lots and the bounding streets were made to occupy a different position than the same occupied according to the original plat of said townsite of 1869. The same is again affirmed by defendant in paragraph 5, as set out in the above statement, where defendant denies that as officially platted and designated prior to September 12, 1885, there was any fraction at all between lots 19 and 20, or any of said lots, "and, on the contrary, alleges that prior to Septem-

ber 12, 1885, according to the official plat of said townsite then existing, said lots 19 and 20 were adjoining lots, and consisted of no more or less than the number of feet frontage than as shown on said plat then existing, or then expressed in the deeds of their predecessors in interest of plaintiff." And the same propositions are again affirmed in paragraphs 6 and 7 of the answer, as shown in the above statement. By these allegations and denials, defendant appears to insist that, according to the original plat of said townsite, said lots, as numbered and conveyed, lie directly adjoining one another, with no fraction, or room for fraction, between any of them, and that according to said original plat said lots comprise no more frontage than shown on the plat, and expressed in the deeds therefor, but that by the second survey and plat of said townsite, in 1885, the position of said lots and bounding streets was so changed as that said fraction did appear by the latter plat to be between two of said lots, namely, 19 and 20. This seems to be the theory of defendant's contention throughout this controversy, as we gather it from the allegations and denials of the answer; he insisting that plaintiff, through the calls of his deeds, both as to the boundaries and the number of feet frontage of said lots, as the same was originally platted, obtained all of the land which said deeds entitled him to.

Proceeding in the examination of defendant's answer, it will be found that he denies the allegation of the complaint that, "said defendant or any other persons except those claiming under plaintiff, have since 1874 been in the seisin or possession of any part of the 160 feet of the ground mentioned in the complaint as being inclosed"; admits that the land occupied by plaintiff has been so occupied for more than five years prior to the commencement of this action, but denies that such occupation, in so far as it relates to lot 31, block 37, was open, hostile, or notorious, or was adverse, or was taken under deeds of plaintiff's predecessors in interest, or in any manner except in subordination to the legal title, which was during that time in the probate judge, in trust for the defendant, and none other, until December 11, 1888; denies that said lots 17 to 20 comprised 161 feet frontage on Main street, according to the original, established, and recognized boundaries thereof, as alleged in

the complaint; denies that, according to an accurate measurement, said lots exceeded the number of feet designated in the deeds from the probate judge therefor by 21.05 or any other number of feet; admits that, according to the calls of said deeds, no excess whatever existed, and admits that the title of plaintiff and his predecessors in interest was acquired and obtained accordingly, but denies that possession was taken accordingly, and denies that the dimensions of said lots mentioned in plaintiff's complaint were governed or controlled by any acts of plaintiff, or his predecessors in interest, or by anything other than the existing plat, showing the identical portion of the earth's surface constituting said lots by numbers and dimensions, as expressed in said deeds, said plat being that originally established and known as the "Wheaton Plat," approved January 7, 1869, of record in the office of, etc.; denies that said Hamilton, on August 20, 1873, or at any other time, tendered or offered to pay the probate judge his fees and the maximum price of said fraction described by plaintiff in the complaint, because no such fraction existed between said lots, as alleged by plaintiff in his complaint, according to any plat or survey of said townsite, and denies that a tender for an alleged thing not in existence would give rise to any right, in law or equity, in favor of said Hamilton, or his successors in interest; alleges that when the original entry of said townsite was made by the probate judge, in trust for the use and benefit of the inhabitants thereof, defendant was, and for a long time theretofore had been; and for a long time thereafter continued to be, in actual, *bona fide* occupation and possession of the identical piece of land in dispute in this case, which was afterwards, but not until September 12, 1885, platted and designated as lot 31 in block 37 of said townsite; alleges that prior to September 12, 1885, no plat of said townsite designated or showed said piece of land, and therefore defendant was unable to apply for and enter and take conveyance of said lot to himself as beneficiary of the trust imposed on the probate judge by conveyance of the legal title of said lot from the United States to him; alleges that after said land in dispute was platted and designated as lot 31, block 37, by the plat approved September 12, 1885, no notice thereof was given, as

required by section 2015 of the Compiled Statutes; alleges that from the entry of said townsite to September 12, 1885, the only plat thereof in existence was one made by A. C. Wheaton, approved January 7, 1869, the same having been made and approved prior to the entry of said townsite; denies that, through any false or fraudulent representations or statements defendant procured a deed for said fractional piece of land from the probate judge, of date December 11, 1888, "but, on the contrary, alleges that all statements, affidavits, and proofs made to said probate judge by the defendant and his witnesses in making application therefor were strictly true."

In view of these denials and affirmations of the answer, and the peculiar conditions and contention shown in the pleadings, I cannot bring my mind to the conclusion, after much careful consideration, that it is a proper case for judgment on the pleadings. The case is not without some complications to be dealt with in proceeding to judgment, and much of the complication lies in ascertaining the exact facts which have prevailed in respect to the piece of land in controversy. The trial court proceeded upon the premise that it was admitted that plaintiff had held possession of the land in dispute, "as alleged in his complaint." No doubt this was justly gained from the liberality with which counsel may have admitted facts in combating the legal hypothesis that plaintiff could have held adverse possession while the legal title of said land in dispute resided in the probate judge. This hypothesis is denied in the answer, but, as a matter of fact, the answer also denies, in the disjunctive form that defendant has held "open, hostile, or notorious, or adverse possession" of said land in controversy; and on this appeal counsel for appellant, in their brief, contend that defendant's answer cannot be properly construed, "as the court states" that "defendant admits that plaintiff has been an occupant of said land for the time alleged."

It has been at least once held, and again intimated, that this court ought not to be governed in the review of a case on appeal by observations in the opinion of the court below as to matters of fact involved. (*Thorp v. Freed*, 1 Mont. 651; *Muller v. Buyck*, 12 Mont. 376.)

However, giving full force to the observation of the trial

court, that it was admitted plaintiff had held possession of the premises in dispute, "as alleged in his complaint," we have seen, upon an examination of the complaint, that its allegations in that respect are obscure, and require a construction of the deeds in the light of evidence as to the actual facts in respect to the occupation of said fraction, in order to get exact knowledge of what was included in the alleged possession of plaintiff and his predecessors; and this inquiry is further complicated by the fact that if what defendant sets forth in paragraphs 1, 2, 5, 6, and 7 of the answer is true (and those facts are not yet denied by replication), plaintiff did not have, and could not have had, actual occupation of said fraction, by the inclosure and possession of said lots, prior to September 12, 1885, because, according to those allegations, which were not denied by replication, the fraction did not lie between any of said lots, and the taking of possession of said lots by plaintiff and his predecessors, as alleged, up to that date, according to the plat, and even according to the position of the bounding streets prior to that date, could not have included said fraction. It does not appear that defendant's counsel abandoned that portion of the answer contained in paragraphs 1, 2, 5, 6, and 7, as numbered in the above statement, nor does it appear that they expressly abandoned any portion of the answer. Now, suppose it be assumed that the facts set out in those paragraphs are true; that is, according to the plat existing prior to 1885, and according to the boundaries, said lots directly joined one another, without any fractional piece of ground between any of them. It would then appear that up to September, 1885, plaintiff and his predecessors, having inclosed said lots according to the plat then existing, and according to the calls of the deeds, both as to the number of feet frontage, and as to the boundaries, did not include said fractional piece of ground. If, on the trial, that should be established as a fact, it would cut off all controversy as to plaintiff's alleged possession of said land prior to 1885, and the controversy would thereby be narrowed down to the history of said fractional piece of land since the new plat was made; and, as we have just seen, defendant denies, as a matter of fact, that plaintiff has had any adverse possession of said fractional piece of land.

Judgment on the pleadings cannot be properly pronounced while any material issues of fact are pending. The judgment is therefore reversed, and the cause remanded.

Reversed.

PEMBERTON, C. J., concurs.

DE WITT, J.—If the complaint in this case is rightly construed to the effect that there is no allegation of possession of the premises by the plaintiff, or if such allegation be considered made, and remains finally denied by the defendant, of course judgment on the pleadings is error. But I am inclined to the view that the difficulties and obscurities, and the want of allegation of possession, in the complaint, which are found by the learned and critical opinion of my associates, arise simply from the very peculiar facts as to the fractional lot called in the year 1885 "Lot 31." The portion of the earth's surface designated in that year as "Lot 31" always existed, but never before that time had that name and description been applied to it. Plaintiff could not allege that he had possession of a lot by that name prior to 1885, but he does allege "that at said last-named date [May 7, 1874] he also became the owner and possessed of a fractional piece of ground, should the same be so regarded, situate between lots 19 and 20." To be sure, he alleges that lots 19 and 20 were contiguous. It seems that they were contiguous by the original survey, but by a later survey there was found to be ground between them, which was then called "Lot 31."

As remarked above, the facts are peculiar, and I think the pleadings state these peculiar facts, and, upon a view of the whole of them, it appears to me that a liberal construction (Code Civ. Proc., § 100) of the pleadings leads to the view that possession of the land itself is alleged, but not of the land by description as "Lot 31." If this be correct, then concede that the answer denies the possession. Then, of course, there should not be a judgment on the pleadings. But how are we to regard the following language in the judgment: "This cause coming on to be heard, it was agreed that plaintiff's occupation and possession of the premises, as alleged in his complaint, was a fact upon which the decision of the court should be based, but denied by the defendant that any adverse

possession could be had or held by said plaintiff, as against him, under the facts set forth in the pleadings herein; also, stood upon the legal questions involved. And the court, in connection with said pleadings, taking into consideration the admission and agreement of the parties in said cause," etc. So it appears by the judgment that plaintiff's occupation and possession was agreed to be a fact ; that is, his poesession as alleged in his complaint; and, as above observed, I think the allegations of the complaint can be fairly construed as alleging the possession of the particular ground in controversy.

The matter which I quote above is not from the opinion of the court below, but from the judgment. It is not a construction of the pleadings by the court below, but is part of the judgment. I have understood all the time that this matter to which I refer was practically, and was, indeed, a stipulation made by the parties upon the hearing in the district court. The language indicates this, for the judgment says that the court, in connection with the pleadings, took into consideration the admission and agreement of the parties. If this is not the true situation, and this matter in the judgment is to be regarded simply as a construction placed by the district court upon the pleadings, then I am of opinion that the denial of possession in the answer forbids a judgment on the pleadings. But I am quite satisfied that this particular matter in the judgment was an agreement of the parties. The judgment itself states that it was rendered upon the complaint of plaintiff, and the answer of defendant, and the motion for judgment on the pleadings, and the admission and agreement of the parties.

Upon a motion for judgment on the pleadings, I do not understand why parties may not agree before the court, and have the agreement go in the record, as it has gone into the judgment in this case, that a certain condition of affairs is the fact, which fact partially modifies the position taken by the pleadings. Such is what the parties, in my opinion, have done in this case in the district court. I think they intended to, and did, present to the district court a situation which may be stated as follows: "Plaintiffs *possessio pedis* of the actual ground in controversy is conceded, and conceded to be, and to have been, adverse, if, under all the other facts in the case, his possession

under those circumstances can be held, as a matter of law, to be an adverse possession." And it was this question of law which I understand the parties, by their pleadings and admission and agreement, intended to, and did, present to the district court, and which was there decided. I think that this was the theory of the case below, and the contention of the parties, and the point of view of the court. Why may not this court properly take the same point of view, and decide whether the judgment should have been rendered upon the pleadings, in connection with the admission and agreement? But as my associates consider that what I have understood to be an agreement or stipulation on the hearing was either not one, or must be disregarded, I will reserve an opinion upon the questions of law until they come to this court, on any further appeal that may be taken.

BONNER, APPELLANT, v. MINNIER ET AL., RE-
SPONDENTS.

[Submitted June 21, 1893. Decided September 5, 1893.]

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23	325

HOMESTEAD—Mechanic's Lien.—A homestead is not exempt from foreclosure and sale to satisfy a lien for materials used by the owner in the improvement thereof, such lien being a "Mechanic's Lien" within the meaning of section 328 of the Code of Civil Procedure providing that the exemption of homesteads from forced sale shall not affect any laborer's or mechanic's lien. (Dr. WITT, J., dissenting.)

Appeal from Third Judicial District, Deer Lodge County.

Action to foreclose mechanic's lien. The cause was tried before DURFEE, J. Defendants had judgment below. Reversed.

Statement of the case by MR. JUSTICE HARWOOD.—This action was brought to obtain judgment, and foreclose a lien to enforce payment, for materials furnished and used in the construction of a certain house in the village of Champion, Deer Lodge county. It appears that said house was built upon a piece of land theretofore vacant, being part of a quartz lode mining claim, purchased by defendant Minnier from one Baudet, which purchase was originally evidenced by a bill of sale

executed by Baudet to Minnier. But it appears to be conceded that the money used in said purchase belonged to defendant Mrs. Minnier; that, while the title to the property stood in that condition, the defendant Minnier, with the knowledge and approval of his wife, commenced the erection of a house on said land, and purchased from plaintiff, and used in said structure, certain lumber and other materials; that, to secure payment for said building material, plaintiff filed his account thereof, and notice of lien on said property, as provided by law; that, some time after the commencement of the construction of said house, a formal conveyance of said premises was made by said original owner, Baudet, and defendant Minnier, to his wife, Mrs. Minnier. Said house appears to have been constructed and arranged so as to be used for residence purposes, or as a place of business, or for both such purposes; that, as soon as the house was sufficiently constructed to admit of habitation, defendant and his wife moved therein, and occupied the same continuously as their home, and Mrs. Minnier also fitted up and operated a barber's shop in one room of said house; that defendants own no other real property as a homestead or otherwise; that defendants failed to pay for said building materials, wherefore this action was brought to foreclose said lien, and subject said premises to sale to enforce such payment. There was no controversy raised in the action as to the furnishing of said building materials by plaintiff, or the use thereof by defendants in the erection of said building, and the nonpayment therefor, as alleged.

The only defense set up was that defendants claimed said premises as their homestead, and that the same, being a homestead, was not subject to a lien for said building materials so purchased and used in the improvement thereof. There was some controversy in the case as to whether said premises constituted the home of defendants at the time said materials were furnished and used in the improvement thereof; but the trial court sustained the contention of defendants that said premises constituted their homestead, and the court further held that the statutes of this state exempt homesteads from the charge of a lien for building materials procured and used in the erection of improvements thereon, and judgment was rendered accord-

ingly, from which judgment, and an order overruling plaintiff's motion for a new trial, this appeal was prosecuted.

Brantley & Scharnikow, for Appellant.

I. The claim of homestead exemption made by defendants is not good as against the claims of the lienors. The homestead law provides that land situated in a village or town, as is the case of the land in controversy herein, shall be owned and occupied as a homestead, in order that it may "not be subject to forced sale on execution or other process from a court." (Comp. Stats., 147, § 322.) It is therefore essential, in order that a claim of homestead exemption may be good, that the property be actually occupied as such at the time the claim sought to be enforced against it accrues. The person asked to give credit will thus be notified of the claim of homestead, and can act accordingly. (Thompson on Homesteads and Exemptions, §§ 244, 247, and 317; 9 Am. & Eng. Ency. of Law, pp. 426, 436, and 447, and note; *Elston v. Robinson*, 23 Iowa, 208; *Charless v. Lamberson*, 1 Iowa, 435; 63 Am. Dec. 457; *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 494; *Walters v. People*, 18 Ill. 194; 65 Am. Dec. 730; *Tumlinson v. Swinney*, 22 Ark. 400; 76 Am. Dec. 432; *Pryor v. Stone*, 70 Am. Dec. 347, note.)

II. We insist further, that the use of the words "laborer's or mechanic's lien" as used in the exception created by section 323, page 147 of the Compiled Statutes of Montana, is generic, and that these are to be taken in a broad and popular sense, embracing every character of lien provided for in the lien law, to wit: Comp. Stats., § 1370, p. 1029. The language of this latter section is general and comprehensive and gives a lien to any person who contributes directly in any way by his labor or material furnished to the improvement of any real estate of whatever kind or character, making no exception whatever.

This statute is called the Mechanic's Lien Law, both in the Compiled Statutes and in the decisions of this court, and the object is to create and preserve ample security to the laborer or material-man. The lien law and the section referred to above (§ 323, p. 147), as they now are in the Compiled Statutes, are

parts of the same general act, and they must be construed so as to make them consistent and not contradictory. This can be done only by regarding the words "laborer's and mechanic's lien" as generic and embracing all classes of liens referred to in the lien law. Where a word having a technical, as well as a popular, meaning is used in a statute the courts will accord to it its popular meaning unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense. (Sutherland on Statutory Construction, p. 329, § 250.)

This constructive meaning of the terms was early recognized by this court in the case of *Mochon v. Sullivan*, 1 Mont. 472.

This court also held in the case of *Merrigan v. English*, 9 Mont. 125, that a mechanic who also furnishes material has a lien as against a homestead for both labor and material.

In *Phelps et al. Windmill Co. v. Shay*, 32 Neb. 19, the court calls the lien for materials a mechanic's lien. The statutes of Nebraska providing for such liens and creating the exception thereunder are similar to ours, and the section granting homestead exceptions uses the same words, to wit: mechanic's or laborer's, as are used in our statute. Yet the court, in construing these two statutes, holds that a material-man has a lien for materials used for the erection of improvements on a homestead. And this is a case in which the lien was for material only.

III. If the debt has accrued prior to the occupation of the property as a homestead, or if the claim is for the money that purchased it, or for the material out of which it was erected, the claim of the creditor is superior to the claim of homestead. (Thompson on Homesteads, §§ 372, 373.) The lien for labor or material, when duly fixed by filing the claim and notice, relates back to the commencement of the labor or the use of the material. (*Mochon v. Sullivan*, 1 Mont. 472; *Merrigan v. English*, 9 Mont. 126.) The lien then having attached itself to the property prior to any occupation by the owner, the necessary act on his part to establish his right to claim the exemption, it follows that it is superior to the homestead right. (*Tuttle v. Howe*, 14 Minn. 145; 100 Am. Dec. 205; *Charles v. Lamberson*, 1 Iowa, 436; 63 Am. Dec. 457.) The statutes

of both Minnesota and Iowa are the same as ours, and ours was taken from them.

IV. The decision in *Walsh v. McMenomy*, 74 Cal. 356, upon which the defendants rely as conclusive, is directly contrary to that of *Phelps etc. Windmill Co. v. Shay*, 32 Neb. 19. But this court in *Lindley v. Davis*, 7 Mont. 212, held that our statute was not taken from the California law, and refused to be bound by the California decisions. The Minnesota, Iowa, and Nebraska statutes being the same as ours, we believe the decisions of those states should be followed as construing the statute according to its true meaning and spirit, and according to principles of sound reason and justice.

W. H. Trippet, for Respondent.

A statute similar to our section 323, page 147, Compiled Laws, has been construed by the supreme court of California, in the cases of *Richards v. Shear*, 70 Cal. 187, and *Walsh v. McMenomy*, 74 Cal. 356, wherein it is held that a material-man is not comprehended by the terms "mechanic" or "laborer." It would certainly require a stretch of the imagination to construe them to mean the same thing or anything like the same thing. *Duncan v. Bateman*, 23 Ark. 327, 79 Am. Dec. 109, is a case in point, and it is there held that "a lumberman is not an artisan, a builder, or a mechanic." The plaintiff here is either a lumberman or a material-man, and it could with as much truth be said that either of those words meant a "laborer" as to say that either of them meant a "mechanic." To say that the exemption of a homestead does not affect the lien of a material-man does violence to the language of our statute. The only case cited by appellant which in any way controverts the California cases is that from Nebraska, reported in 32 Nebraska, 19. The report shows that a petition for a rehearing was filed in that case, but, whatever became of it, the point decided in the California cases was not raised. Plaintiff contends, which is not conceded, that the material was furnished before the building became a homestead, and then cites authorities from the state of Minnesota, from which our homestead law was taken, claiming that they hold that if the lien attached to the property prior to its occupancy as a

homestead, then the lien would be superior to the homestead right. These authorities are squarely against the position taken by the appellant. Thompson on Homesteads and Exemptions, in section 373, shows what these decisions were. The first case was that of *Cogel v. Mickow*, 11 Minn. 478, which laid down a rule directly the opposite to the contention of the appellant here. Then the legislature amended the law changing the rule in that case. Then followed the case of *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205, which held "that, as the statutes now stand, the lien claimant, having a lien anterior and superior to a homestead, may enforce the same without any reference whatever to such homestead right," etc. See the last part of the opinion. The amended statutes under that decision were entirely different from ours. (See Thompson on Homesteads and Exemptions, § 373.) It will be seen also that the case cited by appellant (*Charless v. Lamberson*, 1 Iowa, 436, 63 Am. Dec. 457) does not apply to this case. The decision was on statutes altogether different from ours. The statute in that case provided that the homestead could be sold on debts contracted prior to the passage of the homestead law, and that provision of the statutes, together with prior statutes, governed the decision in the case.

HARWOOD, J.—We think under the facts shown in this case the premises in question were properly held to constitute defendants' homestead.

The important question of law involved in this appeal is whether a homestead is exempt from foreclosure and sale to satisfy a lien created by law in favor of one who furnishes materials purchased and used by the owners of such homestead in the improvement thereof. It is not disputed that by the provisions of chapter 82, page 1028, of the Compiled Statutes of this state, a lien is expressly created in favor of parties furnishing materials contracted for and used by the owners of land in making improvements thereon, without any exception in favor of homestead premises. But it is contended by respondents that, notwithstanding the provisions of that statute, the statute providing exemption of homesteads and other property from forced sale on execution (Code Civ. Proc., §§ 321-

30) withholds the homestead from the operation of such lien if it accrued for material alone, furnished and used in the improvement of the homestead.

To maintain this proposition, respondents rely on a strict and very narrow interpretation and application of the clause of section 323 of the Code of Civil Procedure, which provides that "such exemption shall not affect any laborer's or mechanic's lien, or extend to any mortgage thereon lawfully obtained." It is argued that this provision is not broad enough to include the lien declared by statute in favor of one who simply furnishes materials used in the improvement of a homestead; and that, consequently, the plaintiff, who furnished material only, which was procured and used by defendants in the improvement of their homestead, is barred of relief, by way of enforcement of said lien.

In the case of *Merrigan v. English*, 9 Mont. 113, the court refused to so construe and apply the provisions of the exemption statute just cited as to deny the enforcement of a lien on a homestead for material furnished—namely, a mantel—in favor of the mechanic who furnished the same, as well as the labor involved in setting said mantel in the building. The only real difference between that case and the one at bar appears to be that, in the former case, the lien claimant occupied the position of furnisher of material, as well as labor, on the premises, in shaping the material so furnished into the building; whereas, in the case at bar, the lien claimant furnished and delivered material, without any labor towards the erection of the building on the premises. If the view urged by respondents is adopted the effect of such holding would appear to be that one who manufactured, hauled, and delivered the brick, or quarried, cut, hauled, and delivered the stone, or went into the forest, cut, manufactured, transported, and delivered the lumber contracted for, and used in the erection of improvements on a homestead, would be denied enforcement of the lien which the law declares he shall have to secure payment for such materials, because he would be simply the furnisher of material for the structure, like the plaintiff, and would, according to such construction and application of the exemption statute, not be included within the meaning and intent of the legislature in

declaring that such exemptions shall not affect the liens of laborers and mechanics. We do not think such a view gives effect to the intent of the legislature, as manifest in these statutes. Even without any further expression of the legislative intent on this point than the clause of section 323 above referred to, we could not adopt the view urged by respondents as giving effect to the intent of the law. We are satisfied that, in providing that such exemptions shall not affect any laborers' or mechanics' liens, the legislature referred to the liens for material and labor provided for by the statutes of this state commonly mentioned as the "Mechanic's Lien Law." Such improvements, in fact, comprise labor bestowed upon material, both on and off the premises where the improvement is placed. Payment for the material is payment for the labor expended upon it through all the changes it has undergone, from its natural raw state, until placed in the structure.

But if, in looking at section 323 of the exemption statute alone, there is room to raise doubts as to the intent of the legislature, and room for contention that a homestead claimant may obtain material for improvement on his homestead, and enjoy the same without payment, in case no property can be found over and above the exemption, there is still another provision in the same statute which seems to give further light as to the intention of the legislature on the point under consideration, namely, a provision of section 328, wherein it is declared "that this act shall not be construed as to in any manner relate to judgments or decrees rendered on the foreclosure of mortgages, either equitable or legal." The lien under consideration is a specific encumbrance, existing through a positive enactment of the legislature, operating upon certain facts, and the lienor would seem to be entitled to his judgment of foreclosure, on showing the facts and a compliance with the statute, the same as a party, on making out his case, is entitled to judgment for debt, although the debtor may not have property subject to an ordinary execution. Now, when it comes to the execution of these judgments, it is found that the legislature has made a distinction between them in the statute relating to exemptions, declaring, in effect, that such exemptions shall not be construed to affect judgments or decrees of foreclosure of specific encum-

brances. If this is not the plain intendment of the provisions of the exemption statute last-above quoted, we think it would be difficult to conceive or reasonably explain the intent those provisions manifest.

The rules of construction that several provisions of statutes relating to the same subject shall be considered and construed together, so that all the provisions shall be given reasonable force and effect, if possible (Code Civ. Proc., § 631), and that, "when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted" (Code Civ. Proc., § 638), both, we think, demand such a construction of the statutes in question as will give force and effect to appellant's lien.

Respondents cite, in support of their position, *Richards v. Shear*, 70 Cal. 187, wherein the court held that the homestead was not subject to sale in satisfaction of a lien for material alone, furnished in the improvement thereof. While there is some likeness, but not entire similarity, in the provisions of the California statute and the clause of section 323 of our code above quoted, it does not appear that the California court was aided by such general proviso as we have in section 328 to show the intendment of the legislature. It has been shown that the exemption statute of Montana was not taken from California, in *Lindley v. Davis*, 7 Mont. 207, and *Merrigan v. English*, 9 Mont. 113, and considering the difference of form, as well as additional provisions we have to construe and apply, it would seem to be an abdication of reason to follow the holding in the California case just cited. It should be further observed that in a recent case the supreme court of Nebraska placed a construction opposed to that of California on statutory provisions entirely similar. (*Phelps etc. Windmill Co. v. Shay*, 32 Neb. 19.) The holding in the case of *Duncan v. Batemen*, 23 Ark. 327, 79 Am. Dec. 109, cited by respondents, is based upon different statutory provisions than those prevailing in Montana. It was there held that the statute of Arkansas did not create a lien in favor of one who simply furnished material. Such might be the case. The lien depends on the statute for existence. But here it is not disputed that the statute imposes the lien in favor of appellant; and we

think, without doubt, the legislature intended the homestead should be subject to a lien, and to foreclosure and sale thereunder for material obtained and used by the owners of the homestead in the improvement thereof.

Judgment is therefore reversed, and the cause remanded for proceedings in conformity with the views herein expressed.

PEMBERTON, C. J., concurs.

DE WITT, J. (*dissenting*). This action is brought to foreclose a lien for materials furnished for a building of defendants. The case was tried by the court without a jury. Defendants are husband and wife. The court gave a money judgment against Minnier, but denied the lien. Plaintiff appeals.

The defense against the lien was that the premises were a homestead, and, as such, "not subject to forced sale on execution or any other final process from a court" (Code Civ. Proc., § 322), and that a material-man did not come within section 323, *supra*, which provides that "such exemption [homestead] shall not affect any laborer's or mechanic's lien," etc.

I will examine these two propositions. Our homestead law is as follows: "A homestead consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling-house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any town plot, city, or village; or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city or village, and the dwelling-house thereon, and its appurtenances, owned and occupied by any resident of this territory, shall not be subject to forced sale on execution, or any other final process from a court; *provided*, such homestead shall not exceed in value the sum of two thousand five hundred dollars." (Section 322, *supra*.) Under the law of this state there is no provision, as there is in many states, for filing or recording a declaration of homestead. Ownership and occupation by a resident of the state give the right of homestead. The language of the statute is "owned and occupied"; and,

even without the word "occupied" in the statute, the word "homestead" itself embodies the idea of occupation. (Thompson on Homesteads and Exemptions, § 100 et seq.) It is accordingly held in many decisions that, to constitute a homestead, there must be occupation. (*Kurz v. Brusch*, 13 Iowa, 371; 81 Am. Dec. 435; *Moore v. Granger*, 30 Ark. 574; *Chipman v. McKinney*, 41 Tex. 76; *Avery v. Stephens*, 48 Mich. 246, *Elston v. Robinson*, 23 Iowa, 210; *Christy v. Dyer*, 14 Iowa, 440; 81 Am. Dec. 493; *Blum v. Carter*, 63 Ala. 235; *Charles v. Lamberson*, 1 Iowa, 435; 63 Am. Dec. 457; *Bowker v. Collins*, 4 Neb. 494; *Drucker v. Rosenstein*, 19 Fla. 191, and cases cited on page 195; Thompson on Homesteads and Exemptions, § 241; *Pryor v. Stone*, 70 Am. Dec. 247, and note.)

Again, if a lien becomes fixed upon premises before they become a homestead, it is held in the decisions that the creation of a homestead does not divest the lien. (*Tuttle v. Howe*, 14 Minn. 147; 100 Am. Dec. 205; *Cogel v. Mickow*, 11 Minn. 478; *Potshuisky v. Krempan*, 26 Tex. 307; *Pope v. Graham*, 44 Tex. 198; Thompson on Homesteads and Exemptions, § 317, and cases cited; 9 Am. & Eng. Ency. of Law, p. 465; *McComb v. Thompson*, 42 Ohio St. 139; *Thompson v. Pickel*, 20 Iowa, 490; *McCormick v. Wilcox*, 25 Ill. 274; *Estate of McCauley*, 50 Cal. 544; *Elston v. Robinson*, 21 Iowa, 534; *Furman v. Dewell*, 35 Iowa, 170; *Cougell v. Warrington*, 66 Iowa, 666; *Gunn v. Miller*, 43 Ga. 377; *D'Ile Roupe v. Carradine*, 20 La. Ann. 244; *Gunn v. Barry*, 15 Wall. 611.) See, also, cases cited in last paragraph. Many of the above cases are cited in Thompson on Homesteads, § 317, and sustain the text of that author. It is therefore often important to determine when the lien accrued, and when the occupation of the premises as a homestead commenced. In this case the material was furnished between February 20, and April 28, 1890. The lien for this material, if any exists, dates from the furnishing of the material, and not from the filing of the lien. (*Merrigan v. English*, 9 Mont. 113.)

The facts in the case at bar are as follows: The building was being erected during the time that this material was furnished. The material so furnished was lumber, molding, lime, glass, windows, doors, etc. The lower part of the house was

of logs, a class of material not included in that furnished by plaintiff. It does not appear just when the building was commenced. Some of the witnesses testified that defendant Minnier and wife lived on the other side of the street while the building was being erected. One witness says: "I know this house in controversy, and am acquainted with Mr. Minnier and Mrs. Minnier. I remember when the house was built. They made their home right in the house, and until it was finished. After they had the house commenced, they built a kind of a little house of boards, temporarily, on the back part of the lot, until they could move into the house." All agree that as soon as the house was habitable the defendants moved in. The court found that the premises were the homestead of defendants. That finding is supported, and the homestead is constituted, if there be evidence that defendants occupied the premises as a homestead when the alleged lien accrued. I think that there was such evidence. A portion of the building was of logs. These would naturally be used before the class of material furnished by plaintiff. There was evidence that defendants built a small temporary house on the ground after they commenced the building, and that they lived in that temporary structure. It is not contrary to the evidence that defendants were living on the premises in this temporary structure after they commenced the building, after the log work had been done, and when the plaintiff's material was being supplied.

This case bears some resemblance to that of *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594, decided by Mr. Justice Cooley. The closing language of that opinion is so much in point that I give it entire. "The question now is whether, on the facts recited, the lot had become a 'homestead' in a legal sense before the levy was made upon it. We are of opinion it had. The lot, as has been said, was procured for the purposes of a home, and complainant, aided by the industry and frugality of his wife, was proceeding to make it such as rapidly as their limited means would permit. They inclosed it; they had their domestic animals upon it; they came to live in the immediate vicinity; they made a well; and they put up outbuildings. Everything but the dwelling proper had been erected before the levy was

made, and the complainant was bargaining with a builder for a house. If anything was lacking to make the lot a homestead, it was because the poverty of complainant had precluded his advancing his improvements as rapidly as he desired. The lot, however, in the minds and hearts of complainant and his wife, had been appropriated as a home from before the day of their marriage; it was all the home they had; it represented all their scanty means, and was the center of their domestic hopes and aspirations. They did not as yet sleep upon it or take their meals upon it; and probably, if they had done this in some of the buildings already constructed, their right to claim a homestead would not have been disputed. But this is not an indispensable condition. The man who buys a home which is all ready for occupancy cannot have it taken from him as he is attempting to move in his goods, because he has not yet eaten or slept within it. Anyone might be deprived of a homestead if so narrow a construction of the privilege should prevail. It is people like this complainant and his wife, with very limited means, that the law encourages with its promise to save their home to them if they will but secure one; and it would be a deceptive promise if it were only made on conditions which any creditor might so easily defeat. We think it was meant to be effective in cases like the present, and that complainant is entitled to the relief he prays."

So in the case at bar, the defendants had no other property whatever. They had their all in this house. The house was situate in the town of Champion, Deer Lodge county. The husband occasionally went to Butte for a few weeks to get work. The wife stayed at home in Champion, and worked as a barber. It was in the latter part of the winter that they were building this house, and in this season of the year, which is likely to be inclement, they put up a temporary board house, in which they lived. They went into the building to which the lien is sought to be attached the moment that it was habitable. However far the decided cases go in holding that occupation is necessary to constitute a homestead, the law must be reasonable as to what occupation is. The Iowa supreme court says in *Neal v. Coe*, 35 Iowa, 407, cited in *Drucker v. Rosenstein*, 19 Fla. 196, and also in many

other decisions and by text-writers, as follows: "While intention is not alone sufficient to impress the homestead character, yet it may be considered in connection with the circumstances. Some time usually intervenes after the purchase of property before it can be actually occupied. Even after the process of moving, it frequently takes days before the furniture can be arranged and the house placed in comfortable condition for actual occupancy. Under such circumstances great inconvenience might arise if the homestead character was made to depend upon the actual personal presence of the members of the family. Law is entitled to and can command respect only when it is reasonable, and adapted to the ordinary conduct of human affairs."

The supreme court of Alabama, in *Blum v. Carter*, 63 Ala. 240, after reviewing many of the cases which I have cited above, says: "Guided by these principles we hold that, to constitute a valid claim of homestead, there must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal or to complete needed repairs or a dwelling-house in process of construction. An undefined, floating intention to build or occupy at some future time is not enough. And this intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation of visible character, or by something equivalent to this. (*Daniel v. Collins*, 57 Ala. 625; *Boyle v. Shulman*, 59 Ala. 566; *Preiss v. Campbell*, 59 Ala. 635; *Chambers v. McPhaul*, 55 Ala. 367.)" See, also, the matter discussed in many of the cases above cited, and also in *Williams v. Dorris*, 31 Ark. 466; *Solary v. Hevolett*, 18 Fla. 756; *Barnes v. White*, 53 Tex. 628; *Grosholz v. Neenan*, 21 Wall. 481; *Fogg v. Fogg*, 40 N. H. 282; 77 Am. Dec. 715, which cases I have examined with others cited in the valuable note in *Pryor v. Stone*, 70 Am. Dec. 344. Certainly, a bare intention, without visible acts, to occupy premises as a homestead would not impress them with that character.

As was said in *Solary v. Hevolett*, 18 Fla. 760: "In this case there is no evidence, save the allegation in the answer, that the appellee intended to repair and reside on the premises. He had taken no steps, had done no act, to impress it with

the character of a homestead, although he owned it several months before contracting the debt upon which the judgment was found. His intentions cannot avail him under these circumstances." But in the case at bar it is deduced from the testimony, and not at all unreasonable so to consider, that the defendants were actually upon the ground, in their temporary board house, when plaintiff's material was furnished, and there was present the visible intention to occupy, and the persevering preparation, and the immediate occupation of the building, even before it was fully completed. These facts, I am of opinion, the lower court was justified in concluding brought the case at bar within the doctrine of the cases above cited, and from which I have made the foregoing quotations. *Bona fide* homesteads must be protected under the law, and on the other hand, homestead claims must not be allowed to be made the instrument of fraud. I think the *bona fides* of defendants in this case is sufficiently manifest. It may be that it is a hardship upon plaintiff. He may not have security upon the building into which his material went. But he was not required to furnish the material, and it is not to every class of creditors that the law gives this special statutory security of lien.

And this brings me to the consideration of the second point in the case. Section 323 of the Code of Civil Procedure provides that the homestead exemption shall not affect any "laborers' or mechanics' liens." A homestead is thus not exempt from the lien of a laborer or mechanic. Appellant contends that in the exception the term "laborer or mechanic" is generic, and is intended to include all material-men or lumbermen, as plaintiff is in this case. Section 1370, Compiled Statutes, gives a lien to certain classes of persons, and describes them as "every mechanic, builder, lumberman, artisan, laborer, or other person or persons, association, or partnership or corporation, that shall do or perform any work or labor upon, or furnish any material, machinery, or fixture for, any building," etc. This list of lienors includes mechanics and laborers, and also lumbermen, and general material-men, as persons are called who furnish material. Section 322 of the Code of Civil Procedure exempts the homestead from forced sale on execu-

tion, or any other final process from a court. If the statute of exemptions had stopped here, it is plain that all persons named in section 1370 as lienors would be deprived of any enforceable lien against a homestead. But section 323 follows, and makes an exception to the homestead exemption, and specifically names the excepted classes of persons as "mechanics and laborers." It does not, in terms, except all classes of lienors named in section 1370, but selects two of those classes and names them. If the intent was to let into a lien on a homestead all lienors named in section 1370, the statute would have said so. When it expressly selects two classes only, namely, laborers and mechanics, and designates them by name, and omits to name all other persons in whose company mechanics and laborers are found, in section 1370, the omission is certainly significant, and renders applicable the maxim "*expressio unius*," etc. It is quite true that every man who furnishes material is also, in one point of view, furnishing labor, for every finished product includes the raw material and the labor placed upon it, and, as a rule, the labor in the finished product is of much more value than the raw material. This may be observed universally. The lumberman sells boards. The greatest value in the boards is the labor placed upon them. The quarryman sells building-stones. The original cost of the material was almost nothing. The value of the finished block is almost wholly in the labor. The capitalist sells the use of money, which money represents labor. But when we deal in the wares of the lumberman, the quarryman, or the capitalists, we do not call those wares "labor," nor do we call the dealers in those wares "laborers." Therefore it does not seem to me to be the simplest and plainest construction of the statute to make the words "laborer or mechanic" include a material furnisher, because the material supplied by that furnisher is the result of labor. I am of opinion, therefore, that the words "mechanics and laborers" in section 323, are not generic, as appellant urges, and would not include material-men and lumbermen. This view has been held in California. (*Richards v. Shear*, 70 Cal. 187; *Walsh v. Mo-Memory*, 74 Cal. 356.) I quote as follows from 70 Cal.: "It is said for the appellants that it was not the intent of the legis-

lature to subject the homestead to execution or forced sale in satisfaction of judgments obtained on debts secured by liens of mechanics and laborers who perform manual labor in and about the building, and withhold such privilege from the men who furnish material therefor. We can see great force in the suggestion of Mr. Thompson, in his work on Homesteads and Exemptions, section 312, that there is no difference in principle between a debt due to A, who has provided me with the land upon which I have erected my building, and a debt due to B, who has furnished the materials to build it, and a debt due to C, whose labor has built it. But where the legislature has undertaken to deal with the subject, and has declared from what the homestead shall be exempt, and with what it shall be charged, it only remains for the courts to give effect to its provisions. Admittedly, the language of the section of the code specifying in what instances the homestead shall be subject to execution and forced sale does not include the liens of material-men. The language is in satisfaction of judgments 'on debts secured by mechanics, laborers, or vendors' liens upon the premises.' The chapter of the Code of Civil Procedure which provides for liens of the nature claimed by the plaintiffs is headed 'Liens of Mechanics and Others Upon Real Property,' and gives to 'mechanics, material-men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class, performing labor upon or furnishing materials to be used in the construction a lien,' etc. (Code Civ. Proc., § 1183.)"

I do not observe any marked distinction between the California statute and our own, nor can I agree that section 328 of our Code of Civil Procedure helps the contention that a pure material-man may enforce a lien against a homestead. Section 323 of the Code of Civil Procedure provides that this homestead exemption shall not affect a laborer's or mechanic's lien. I think we all concede that the enforceability of the laborer's and mechanic's lien is intended to be saved by this section, even granting that my construction of the words "laborer" and "mechanic" is correct, and that those terms are not generic, so as to include all material-men.

Now, it is further suggested that the enforceability of liens,

including material-men's (such as plaintiff herein), is saved by the proviso of section 328, which is as follows: "*Provided*, That this act shall not be construed as to in any manner relate to judgments or decrees rendered on the foreclosure of mortgages, either equitable or legal." The construction of this proviso, as held by part of this court, makes the words, "mortgage, either equitable or legal," in section 328, to include material-men's liens. I cannot satisfy myself that such inclusion was intended. A mortgage is an encumbrance placed upon property by the acts of the parties, either expressly so intended by the parties or so construed by a court of equity. On the other hand, the mechanic's, or laborer's, or material-man's lien is given by virtue of an express statute. A mortgage is given by the debtor voluntarily, either expressly or by construction of equity. A mechanic's or laborer's or material-man's lien is secured against the debtor without his consent. A mortgage has the characteristic of a lien, in that it is a security upon property. A mechanic's lien is also a security on property, but it is not obtained by the voluntary act of the debtor. A mortgage is a lien, and something more. (1 Jones on Liens, §§ 2, 11.) I quote from those sections as follows: "The word 'lien' is here used in its legal and technical sense. Much confusion has arisen from using the word in a loose manner, at one time in its technical sense and at another in its popular sense. It is often convenient and proper to speak of the lien of a mortgage or of the lien of a pledge. Of course, it will often happen, when the word is used in this sense, that the description of the lien shows that the word is used merely to denote the charge or encumbrance of a mortgage, pledge, attachment, or judgment." SEC. 2. "A mortgage is sometimes inaccurately called a lien. 'And so it is,' says Mr. Justice Story, 'and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and, according to the intention of the parties, as a qualified estate and security. When the debt is discharged,

there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.' (*Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441.)" SEC. 11. I think that the intent of the proviso of section 328 was to treat of mortgages, as the language says, and not of the material-men's liens, which are not mentioned in terms, and which it is not necessary to include in the word "mortgage." In this view, the proviso of section 328 looks to the saving of a security created by the act of the party, namely, a mortgage. This seems wholly just. It is right that the debtor should not be relieved from a security which he had voluntarily created. But when the statute makes this sort of a declaration, I do not understand that we must also hold that, by the same language by which it retains the security of the voluntary mortgage, it also intended to retain the security of the involuntary mechanic's lien, which operates against the debtor *in invitum*, which was the creature of the statute, and not of the debtor.

The appellant cites us to *Phelps etc. Windmill Co. v. Shay*, 32 Neb. 19, as holding a view contrary to that which I entertain. All that is said in that case is as follows: "Section 3, chapter 36, Compiled Statutes, provides that 'the homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. On debts secured by mechanics, laborers, or vendors' liens upon the premises; 2. On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife or an unmarried claimant.' This section makes the homestead liable for a mechanic's lien." The matter is thus disposed of by the Nebraska court in one line of the opinion. Whatever good reasons that court had for its views are not disclosed by the opinion, which, therefore, does not give me any light. The cause of action in the Nebraska case was for supplying a windmill. The counsel in the case for the lienor put their claim upon the ground that it was for both labor and material, and that only pure material-men were excluded by the homestead exemption. That the claim was for both labor and material does not, however, appear in the statement of facts made by the court, nor in the meager expression of opinion as

to the law. But if the Nebraska case was, as counsel therein argued, one for material and labor both, then the case is not in conflict with the views which I suggest; and, if the case was one for material only, all that I can say is that the case was not sufficiently reasoned out to give me any satisfaction.

This matter was suggested in *Merrigan v. English*, 9 Mont. 126, and the 70 and 74 California cases were called to the attention of the court. But the court held that those cases were not in point in *Merrigan v. English*, and said: "In each of the cases cited the court treated the lien as a lien for material alone. In the first case cited the lien, as a matter of fact, was for material only. We do not hold that a material-man has such a lien as will be valid against a homestead. That is not the question before us."

I am therefore of opinion that the district court should be sustained in its finding that the premises were a homestead, and also in its conclusion that a pure material-man or lumberman cannot enforce a lien against a homestead.

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JORGENSEN, APPELLANT, v. BUTTE AND MONTANA COMMERCIAL COMPANY, RESPONDENT.

[Argued October 18, 1892. Decided September 5, 1893.]

TRIAL—Directing verdict for defendant—Master and servant.—An instruction to find for the defendant upon the conclusion of plaintiff's testimony is proper in an action by an employee for personal injuries alleged to have been caused by the incompetency of a collaborer and unskillful treatment of the wound by surgeons employed by defendant, where the evidence tends to show that plaintiff contributed to his own injuries by disobedience of instructions; that the collaborer was not working with plaintiff at the time; that plaintiff after being hurt stated that he alone was to blame, and the evidence fails to disclose any requirement of particular skill on the part of the collaborer or lack of skill if required, or knowledge by defendant of any such incompetency of which plaintiff was ignorant, or that the surgeons were negligent or unskillful.

WITNESSES—Cross-Examination.—In an action for personal injuries a witness who has testified to facts contemporaneous with the injury and closely connected with the main fact may be cross-examined as to the entire case, especially where such witness was a collaborer to whose incompetency plaintiff attributed his injury.

PLEADING—Amendments.—It is not error to permit a defendant to amend his answer while the jury is being impaneled where the amendment does not surprise, injure, or inconvenience the plaintiff, and no continuance is rendered necessary or demanded on account thereof.

Appeal from Eighth Judicial District, Cascade County.

Action for personal injuries. The cause was tried before BENTON, J., who directed a verdict for defendant. Affirmed:

F. C. Park, for Appellant.

I. It was error for the trial court to allow respondent to amend its amended answer while the jury was being impaneled. Respondent filed no affidavit, showed no cause for amending, gave no notice to the adverse party, and no terms were imposed as a condition therefor. (Code Civ. Proc., § 116; *Hayden v. Hayden*, 46 Cal. 333; *Canfield v. Bates*, 13 Cal. 606; *Martin v. Thompson*, 62 Cal. 622; 45 Am. Rep. 663; *Howe v. Independence Co.*, 29 Cal. 74.)

II. The court erred in permitting respondent to cross-examine the witness Harlander on the whole of the case when he had only been examined as to a definite part thereof. (Greenleaf on Evidence, 4th ed. § 445.) Appellant was thereby deprived of the right to impeach the witness on the matters developed on cross-examination, which he might have done had respondent called him in its own behalf.

III. The court erred in granting respondent's motion for a nonsuit. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 453; *Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 172; *Cunningham v. Union Pac. R. R. Co.*, 4 Utah, 206; *Conly v. McDonald*, 40 Mich. 158; *Commissioners v. Clark*, 94 U. S. 284; *Schuchardt v. Allins*, 1 Wall. 369; *Drakely v. Gregg*, 8 Wall. 268; *Insurance Co. v. Rodel*, 95 U. S. 238; *Kelly v. Hendrie*, 26 Mich 256; *Blackwood v. Brown*, 32 Mich. 107; *Brooks v. Somerville*, 106 Mass. 271; *Denny v. Williams*, 5 Allen, 1; *Fisk v. Wait*, 104 Mass. 71; *Smith v. First Nat. Bank*, 99 Mass. 612.)

Arthur J. Shores, for Respondent.

PEMBERTON, C. J.—This is a suit for damages for personal injuries. The appellant, who was plaintiff below, alleges in his complaint that he is a skilled carpenter; that on March 5, 1891, he was employed by respondent to work on its mill at Great Falls; that on the twentieth day of March, 1891, while

engaged at work handling heavy plank on the third story of respondent's said mill, he fell to the floor below, breaking his leg; that his fall, by which he was so injured, was caused by the incompetency, lack of skill and knowledge, of one Harlander, a collaborer, who was engaged in assisting him in his work; that defendant knew of the incompetency of the said Harlander, and appellant did not. The complaint further alleges that defendant employed, as it was bound to do under its contract with appellant, surgeons to treat his broken limb; that these surgeons so carelessly and unskillfully treated his leg, and were so negligent in nursing and caring for appellant during his sickness, that it became and was necessary to amputate the leg of appellant in order to save his life; that the want of skill and ability of said surgeons was known to the respondent at the time, and unknown to appellant; that defendant was guilty of negligence in the employment of said unskillful laborer to assist appellant in his work on said building, and in the employment of unskillful and negligent surgeons to treat and nurse him. The appellant testified to the fact of his falling, how it occurred, and the result. He attributes his fall to the incompetency of Harlander. As to the manner of his treatment by the surgeons and nurses, his evidence is unreliable, as he admits that a great part of the time he was unconscious. Besides, his testimony does not show any knowledge of these matters. He was manifestly not supported by the testimony of his other witnesses as to the material facts in his evidence. Harlander, the man, appellant says was assisting him at the time he fell, and to whose incompetency appellant attributes his fall and injury, swears he was not helping appellant at the time he fell and was injured; that the appellant was working alone at that time. H. L. Smith, another witness for appellant, testified as follows: "I talked with him [appellant] about this fall. He said he slipped and fell, and said nobody was to blame for it but himself." The appellant testified that at the time he fell he was using a pevée in handling and moving the planks. Beecher, a witness for appellant testified that he was a carpenter, at work on the same building with appellant at the time he fell; that appellant was using a pevée; that he considered it safer working where appellant was without a pevée,

and that the superintendent had given all the men instructions not to use a peeve in work like that in which appellant was engaged. The evidence offered by the appellant as to the negligence and want of skill of the surgeons who treated him is vague and far from being satisfactory. It is true the appellant testified to some apparent neglect and want of care during his sickness. Smith, a witness for appellant, testified that he assisted in taking care of the appellant part of the time; talked to him about his condition; that he did not complain at any time of how he was treated; that there was no lack of attendance at any time. The surgeon who treated him testified to proper treatment and care of appellant. Although there is some evidence of unprofessional witnesses which might be construed into meaning that there was some want of care, yet, on the whole, the evidence seems to show that as good care as the circumstances would admit of was bestowed upon appellant. There is no evidence showing that the surgeons employed to treat appellant were not skilled and learned in their profession. All these witnesses were the appellant's witnesses. The defendant offered no evidence, but on the conclusion of the testimony offered by appellant moved the trial court for an instruction to the jury to render a verdict for the defendant. The court gave this instruction, and upon the verdict so rendered a judgment was entered for the defendant for costs. From this judgment this appeal is brought.

The principal error complained of is the action of the trial court in directing the jury to render a verdict for the respondent. This action of the court was tantamount to directing a nonsuit against the appellant for failure of the proof to sustain the allegations of the complaint. (*McKay v. Montana Union Ry. Co., ante*, p. 15; *Creek v. McManus, ante*, p. 152.) If there was such failure of proof the action of the court was not error. The evidence does not disclose wherein any particular skill was required on the part of appellant's collaborer to do the work he was employed in doing, or, if skill was necessary, wherein it was not exercised, or, if there was a lack of necessary skill, that the defendant had knowledge thereof, and that appellant was ignorant thereof. The evidence offered by plaintiff tends to show that he contributed to his own injury,

by disobeying orders not to use the peeve in the work he was doing: The evidence also tends to show that Harlander, on account of whose incompetency and want of skill appellant claims he was injured, was not working with appellant at the time he fell. Harlander so swears. Witness Smith also testified that after appellant was hurt he stated that he alone was to be blamed; that he slipped and fell from the building. The evidence shows that the surgeons and physicians employed by respondent to treat appellant were duly licensed, qualified, and authorized, under the laws of this state, to practice their profession, and fails to show that appellant hurt his leg or sustained damage as a result of a want of skill or care on their part in the treatment of his wound. From this review of the evidence, we are unable to see how the court below could have done otherwise than to instruct the jury to find for the defendant, or direct a nonsuit on the close of the appellant's testimony. On the evidence, we are of opinion that appellant had shown no right to recover, or that there was any substantial merit in his cause.

Appellant also complains of the action of the court in permitting the cross-examination of the witness Harlander. Appellant placed the witness on the stand, and stated that "the witness would refer to the time and place Mr. Jorgenson fell for the purpose of fixing the time and place of other events in connection with the case, and does not wish to make the witness his witness as to the acts he was doing at the immediate time of the fall." The witness swore to facts contemporaneous with the fall of the appellant, so closely connected with the main fact that we think there was no error in permitting his being cross-examined as to the entire case, especially as he was the person to whose want of skill and care the appellant attributes his fall and injury.

The appellant also claims that the trial court erred in permitting defendant to amend its answer while the jury was being impaneled. It does not appear that appellant was surprised, or in any way injured or inconvenienced, by the amendment. No postponement or continuance of the cause was rendered necessary thereby, or demanded on account thereof, by appellant.

We are unable to see how appellant was aggrieved by this action of the trial court.

The appellant's deposition was read by his counsel in evidence at the trial, he not being present. Counsel for appellant did not, for some reason, desire to read the whole thereof to the jury. At the request of the defendant the court required the appellant's counsel to read the whole thereof. This is urged as error. Without inquiring whether this was error or not, it is apparent the appellant was not injured, as the part of the deposition the appellant sought to omit referred to the contract for nursing and medical treatment set up in the complaint, and the reading thereof to the jury could not possibly damage the appellant. We have been unable to discover any substantial errors in the rulings and action of the trial court in the trial of this cause. The case seems to us to be void of merit, on the appellant's own showing. The judgment of the court below is affirmed.

Affirmed.

HARWOOD, J., and DE WITT, J., concur.

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BOHN MANUFACTURING COMPANY, RESPONDENT,
v. HARRISON, APPELLANT.

[Submitted October 31, 1892. Decided September, 5, 1893.]

EVIDENCE—*Negotiable instruments.*—Parol evidence of an agreement that the acceptance of a bill of exchange should not be a waiver of counterclaims which the acceptor then held against the drawer is admissible in an action on the bill, as such evidence contradicts not the instrument, but merely the presumption of waiver which arises from the fact of its acceptance.

Appeal from First Judicial District, Lewis and Clarke County.

Action on bill of exchange. Demurrer to defendant's answer was sustained by BUCK, J., and judgment rendered for plaintiff. Reversed.

The other facts fully appear in the following statement by DE WITT, J.

The defendant appeals from a judgment rendered upon the sustaining of plaintiff's demurrer to the answer. The com-

plaint alleges that on November 27, 1889, defendant accepted a bill of exchange drawn by the plaintiff for \$850, at thirty days from that date. The bill was not paid by defendant when due, and was duly protested. The demand for judgment is for the amount of the bill, \$850, protest fees, and interest from December 30, 1889. The defendant set up in the answer three counterclaims, aggregating some \$898. The nature of these counterclaims is the same, and the statement of one will present the principles involved in all. About May 1, 1889, the defendant and one Hall were partners in the building business. On August 5th defendant bought out his partner, and assumed the obligations, and took the rights and demands of the firm. This firm of Hall and Harrison had a contract with one Gates to erect a portion of a building in Helena. They contracted with plaintiff to furnish the mill-work for said building for a given sum. The answer then sets up that plaintiff failed in performing said agreement, and gives in detail a large number of items which the plaintiff failed to furnish in accordance with its contract. The answer then alleges that defendant was obliged to purchase these articles, and pay for them certain prices, which are named, and which are alleged to be reasonable, and the total of which is \$720. The defendant then alleges that he had a fully accrued claim of \$720 against plaintiff before his acceptance of the bill of exchange sued upon, and which was unsettled at that time. The answer further alleges that said bill of exchange was drawn and accepted with the express understanding and agreement between the parties thereto that, when paid, it should operate as a payment on their general unsettled account; that before the bill of exchange was drawn or accepted defendant had notified plaintiff of its failure to perform its contract as aforesaid, and plaintiff had promised to compensate defendant for any and all failure to so perform its said contract; and that, relying on said promise, this defendant accepted said bill as alleged in the complaint. The other counterclaims, as above observed, are similar to this one.

The plaintiff moved to strike out from the answer that portion which pleaded that the bill of exchange was accepted with the agreement that it should be a payment on the unsettled

account, and that it was accepted by defendant, relying upon the promise of plaintiff to compensate defendant for the alleged failures in carrying out its contract. This motion was made upon the ground that this allegation was an attempt to set up a parol agreement to vary and contradict the terms of the written instrument; that is, the bill of exchange. This motion was directed at each of the counterclaims, and as to each was sustained by the court. The plaintiff demurred to the answer, as to each one of the three counterclaims, on the ground that they did not constitute a defense or counterclaim, for the reason "that when defendant executed and delivered to the plaintiff herein the bill of exchange which is the subject of this action, if he ever had any counterclaim or setoff to plaintiff's cause of action against him at that time, he (the defendant) waived the same in so executing and delivering said bill of exchange to this plaintiff." The demurrer was sustained, and, no further answer being filed, judgment was entered for plaintiff.

The position of appellant is, that it was competent to allege that when the bill of exchange was accepted, the parties agreed that it should be simply a payment on account, and not a settlement of the mutual and unsettled accounts between them or a waiver of defendant's alleged counterclaims, and that such evidence of such agreement did not vary the terms of a written instrument, to wit, the bill of exchange; and that, such allegations being competent, any presumption of waiver of the counterclaims, by virtue of the acceptance of the bill of exchange, is done away with, and the answer sets up counterclaims good as against the demurrer. Respondent's position is that the allegations stricken out could not be proved, for it was an offer to vary the terms of a written instrument by parol testimony, and without these allegations the acceptance of the bill of exchange waived the counterclaims.

Leslie & Oraven, for Appellant.

I. This is a suit, not between the acceptor and an innocent holder of a bill of exchange, but between the drawer and the acceptor. Before a party can be heard to urge estoppel or waiver, he must be misled by the conduct, act, or words, or

silence of another. Or, to express it otherwise, the act, or failure to act, the words, or failure to utter words, alleged to be a waiver or estoppel, must have misled or deceived the party urging the plea. It will not be contended that plaintiff was deceived, misled, or in any way misunderstood the transaction in question. (*Crossan v. May*, 68 Ind. 242; *Henry v. Gilliland*, 103 Ind. 177; *Burritt v. Dickson*, 8 Cal. 113.) The doctrine of estoppel proceeds wholly on the theory that the party to be estopped has, by his declaration or conduct, misled another to his prejudice, so that it would be a fraud upon him to allow the true state of facts to be proved. (*Martin v. Zellerbach*, 38 Cal. 300.) To constitute an estoppel *in pais*, there must be some act or admission, or neglect to act, on the part of the party estopped, upon which the other party has acted or relied, and in consequence thereof, and through the fault of the party estopped, has placed himself in some respect in a worse position than he otherwise would have been. (*Bowman v. Cudworth*, 31 Cal. 148; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; 1 Rapalje's Digest, 1290; see, also, *Wiggin v. Damrell*, 4 N. H. 69-75.)

II. The principle of law referred to in plaintiff's second ground of motion, to wit, that the paragraph objected to is an attempt to vary the terms of a written contract by a parol agreement, is, of course, universally admitted, but certainly has no application to the case in hand; there is no such purpose intimated in the paragraph objected to, or in any part of the pleading. Upon the trial there will be no effort to vary, modify, or contradict the terms or substance of the paper sued on. Defendant certainly has the right to allege and prove that the bill of exchange was not given on settlement or liquidation of the accounts or transactions out of which the different counterclaims set up and charged arose, and for that purpose, if for no other, the parts of the counterclaims proposed to be stricken out should stand.

F. N. & S. H. McIntire, for Respondent.

It is well settled that where parties have mutual dealings, and settle them with negotiable paper, all the transactions are merged in the new contract, and it is a complete settlement.

If the acceptor of the bill has any claim or cause of action against the drawer for anything that occurred in their dealings prior to the acceptance, by such acceptance he waives his claim. (Randolph on Commercial Paper, § 1870; *Reid v. Field*, 83 Va. 26; *Leonard v. Hastings*, 9 Cal. 236; *Griffith v. Trabue*, 11 Heisk. 645; *Audleur v. Huffel*, 71 Ind. 546; *Stiles v. Brown*, 1 Gill, 350; *Orr v. Hopkins*, 3 N. Mex. 45; *Allen v. Bryson*, 67 Iowa, 591; 56 Am. Rep. 358; *Borchsenius v. Canutson*, 7 Ill. App. 365; *Dutcher v. Porter*, 63 Barb. 15.) But even if appellant did not waive his counterclaims, are the matters set up in his answer as counterclaims sufficient to make them such? They appear to be unliquidated demands. The original contract is not pleaded with any sufficient certainty to enable anyone to say to what extent there was a breach of the contract, or to what extent, if any, the defendant was damaged under his contract. Unliquidated damages are not proper subjects for counterclaims. (Sedgwick on Measure of Damages, 8th ed., § 1031; 3 Randolph on Commercial Paper, § 1849; *West v. Hayes*, 104 Ind. 251; Daniel on Negotiable Instruments, §§ 1423-25.) The acceptance, upon its face, appears to create an unconditional debt from appellant to respondent, and yet parol evidence is sought to be introduced or vary this written instrument. This is not proper. (Comp. Stats. Div. 1; § 628; *Fisher v. Briscoe*, 10 Mont. 125; Tiedeman on Commercial Paper, § 42; 4 Lawson's Rights, Remedies, and Practice, § 1476; 1 Daniel on Negotiable Instruments, § 80.)

DE WITT, J.—The first matter for consideration in this case is whether it was an offer to vary or contradict the terms of a written instrument, when the defendant pleaded in his answer that it was understood between plaintiff and defendant that the acceptance of the bill of exchange should not be a waiver of the counterclaims which defendant alleged he then held against the plaintiff. It is our opinion that the pleading of this matter was not an offer of parol testimony to vary the terms of a written instrument. It is not the terms of the written instrument that are sought to be varied or contradicted by this evidence. Instead of that, it is simply a presumption,

which, it is claimed by the plaintiff, arose from the fact of executing the instrument that is sought to be varied by this parol testimony. The defendant concedes the written instrument, in all its force. He concedes his liability upon it. The plaintiff contends that the execution of this instrument—that is, the acceptance of the bill of exchange—was a waiver of defendant's alleged counterclaims existing at that time. The written instrument itself does not, on its face, disclose such waiver, but the waiver, if any there were, is a result, or an inference, or a presumption from the fact of executing the instrument, and the fact of the existence of the counterclaims at the time of such execution. Now, this parol evidence is offered to overthrow nothing in the instrument itself, but simply to combat an inference or presumption drawn from the instrument and other facts. This presumption is not a written instrument, nor contained in the terms of a written instrument. Therefore to overthrow it is not varying the terms of the instrument. Let us fully concede, for the purpose of this decision, the position urged by respondent—that the acceptance of the draft, in itself, and unexplained, is a waiver of the counterclaims of the person accepting the draft. (See cases cited by respondent.) But whatever legal presumption might arise from the acceptance of the draft, it is only a presumption arising from the conduct of the parties, and disappears before the positive allegation, admitted by the demurrer to be true, that the parties intended that no such presumption should arise from said acts; that is, it is pleaded that the parties intended that the acceptance of the drafts should not be a waiver of the counterclaims. It was perfectly competent for them to entertain this intention between themselves at the time of drawing and accepting the draft, and there are no third parties, as innocent purchasers, now interested, who have been misled by the actions of the plaintiff and defendant in the case.

In the cases cited by the respondent in its brief, we find one of two situations: Either that the commercial paper in question was given expressly as a settlement of mutual accounts, and understood and agreed to be such settlement, or, as in the other cases, of which *Reid v. Field*, 83 Va. 26, is a good example, the case was that it was not pleaded, or undertaken to

be shown, that there was any understanding or intention between the parties that the giving of the commercial paper should, expressly, not be a waiver of the counterclaim. Therefore, the authorities presented by respondent are not in point upon the proposition raised by these pleadings. *Fisher v. Briscoe*, 10 Mont. 133, also, is not in point. The parol agreement there attempted to be brought into the case was one to defeat the payment of the note at the time when it was sued upon. But, as shown above, the parol matter in this case was not a defense against the note, and was not offered in resistance of the payment of the note. It was simply an agreement and understanding that the parties did not intend that there should arise, from the fact of accepting the draft, a presumption of waiver of the counterclaims.

We are therefore of opinion that whatever presumption of waiver could be held to arise from an unexplained acceptance of the draft, such presumption did not here arise, because the acceptance is not here unexplained. On the other hand, the parties expressly agreed among themselves that that presumption should not arise, and that the fact which it presumed was not true. Of course, the treatment of this case is upon the ground that all the allegations of the answer are confessed as true upon the demurrer. It therefore appears to us that a defense was set up by the answer, and that the demurrer should not have been sustained. In the view that we take of the competency of the allegations discussed, the court erred in sustaining the motion to strike them out. As a consequence, if they had been left in the complaint, the counterclaims would have been well pleaded, showing, as they did, their existence and their nonwaiver. Consequently, if the motion to strike out had been denied, as we think it should have been, the demurrer should have been overruled.

The judgment is reversed and the case remanded to the district court, with directions to proceed in accordance with these views.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

18	300
18	518
24*	36
25*	118

3	300
1	439

MATTOCK, RESPONDENT, v. GOUGHNOUR, APPELLANT.

[Argued February 14, 1893. Decided September 5, 1893.]

APPEAL—New trial.—When an appeal is taken from the entire judgment and order of the trial court refusing a new trial, a reversal of the judgment and order requires a new trial of all the issues as if the case had never been tried.

APPEAL—New trial—Conflicting evidence.—The ruling of the trial court upon a motion for a new trial will not be disturbed on appeal where the evidence is conflicting and no abuse of judicial discretion appears upon a consideration of the whole record.

Appeal from Sixth Judicial District, Park County.

Action for debt. The cause was tried before HENRY, J. Plaintiff had judgment below. Affirmed.

PEMBERTON, C. J.—This is a suit for debt. There are two counts in the complaint, the first alleging an indebtedness for labor done and performed. The second is based on a due bill. This is the second appeal of the case. (See *Mattock v. Goughnour*, 11 Mont. 265.) The former appeal was taken from the entire judgment, as well as the order denying a new trial. This court reversed the judgment, set aside the order appealed from, and remanded the cause for new trial. At the second trial of the case in the court below the appellant sought and requested the court to confine the issues to be tried to the first count in the complaint, claiming that the judgment of this court on the former appeal was limited to the insufficiency of the evidence to sustain the verdict of the jury on said first count and consequently left nothing to be tried but the issues under this count. The appellant, at the close of the testimony, requested the court to instruct the jury in this respect, as follows: " You are instructed that the only issue in controversy in this action is as to the employment of the plaintiff by the defendant subsequent to the twenty-fifth day of October, 1888, and you will exclude from your consideration all evidence of the execution of the due bill and the payment made thereon." The court refused the request of the appellant, and this action is assigned as error on this appeal.

The former appeal of this cause was from the entire judgment and order of the trial court refusing a new trial. This

court reversed the entire judgment, and set aside the order denying a new trial, and remanded the cause for a new trial. This placed the case in the court below, at the time of the second trial, in the same condition as if it had never been tried at all. The former appeal was not taken from a part of the judgment rendered at the first trial, as might have been done. (Code Civ. Proc., sec. 444, p. 180; *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461.) Everything done in the first trial by the court below was reversed, set aside, and the whole case remanded for a new trial by this court on the former appeal. We think the court committed no error in refusing the request of appellant complained of here. We cannot see how the trial court could have done otherwise than try the whole case anew.

The appellant insists that the evidence is insufficient to sustain the verdict, and claims the evidence is substantially the same as on the former trial, and claims that as this court held the evidence insufficient to support the verdict in the former trial, it must do so in this appeal. The respondent claims that the evidence is not the same in this as in the former trial; that other evidence and circumstances are disclosed in this record, not in the former, sufficient to authorize and support the verdict, and the record sustains this position. There is, it must be confessed, a palpable conflict in the evidence in this case. The jury, we think, would have been justified in finding for either party. We cannot say that the evidence is so satisfactory as to make it clear to our minds that the verdict should not have been the other way. But it is the province of the jury, under the law, to pass upon the credibility of the witnesses, and the weight to be given to their testimony and to determine conflicts therein. The court below heard the witnesses testify on the stand, observed their manner, considered whatever interest they may have had in the result of the suit, and doubtless duly considered these matters in passing upon the motion for a new trial. In such matters a very large discretionary power is given to the trial court, and rightly so. We cannot interfere with the exercise of this power, unless convinced from a consideration of the whole record that there has been shown abuse of such discretionary power. From such consideration of the

record, we are not satisfied that there has been such an abuse of discretion as to make it incumbent upon us to interrupt the judgment and rulings of the court below, especially as this is the second trial of this cause. The judgment of the court below is affirmed.

Affirmed.

HARWOOD, J., concurs.

DE WITT, J.—I concur in the affirmance. My views were fully expressed on the former appeal. (*Mattock v. Goughnour*, 11 Mont. 265.)

13	302
13	494
24*	26
34*	614
13	302
15	471
24*	28
39*	575

STATE EX REL. NEWELL, RESPONDENT, v. NEWELL,
APPELLANT.

[Submitted January 26, 1893. Decided September 5, 1893.]

HABEAS CORPUS—Infants.—It is a proper exercise of discretion on *habeas corpus* to award to a mother the custody of a child between nine and ten months old, and not of robust health, where no attempt is made to show that she is immoral or in any way unfit to care for the infant, and her parents are willing to provide for it.

HABEAS CORPUS—Costs—Statutory construction.—A *habeas corpus* proceeding is a special proceeding in the nature of an action, the disposition of the writ is a judgment, and the relator a plaintiff, within the meaning of section 495 of the Code of Civil Procedure, allowing costs to the plaintiff upon a judgment in his favor in special proceedings in the nature of an action.

Appeal from Ninth Judicial District, Gallatin County.

Habeas corpus by a wife to obtain possession of her infant child from her husband. Judgment was rendered for relator by ARMSTRONG, J.

E. P. Cadwell, for Appellant.

I. The court below erred in giving the custody of the child to its mother as against the father. (Church on *Habeas Corpus*, §§ 113, 438–54; *Matter of Wollstonecraft*, 4 Johns. Ch. 79; *Commonwealth v. Smith*, 1 Brewst. 347; *State v. Bratton*, 15 Am. Law Reg., N. S., 359, see note; *State v. Richardson*, 40 N. H. 272; *Commonwealth v. Briggs*, 16 Pick. 203; *Ex parte Boaz*, 31 Ala. 425; *Brinster v. Compton*, 68 Ala. 299; *People v. Olmstead*, 27 Barb. 10; *Matter of Waldron*, 13 Johns.

418; *People v. Meroein*, 8 Paige, 47; 3 Hill, 399; *People v. Chegaray*, 18 Wend. 641; 4 Am. & Eng. Ency. of Law, 314; *Brown v. Rainor*, 108 N. C. 204.)

II. The court below erred in rendering judgment against appellant for costs. (*Turnham's Executrix v. Shouse*, 8 Dana, 3; 33 Am. Dec. 473; *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; 3 Blackstone's Commentaries, 399; *In re Reilly*, 10 L. T., N. S., 853; *State v. Collins*, 54 Iowa, 441.)

DE WITT, J.—This appeal is from the judgment of the district court made upon the hearing of the application of Eva-lena Newell for a writ of *habeas corpus*. The proceeding was brought by the relator to obtain possession of her infant child, of the age of nine months. The respondent is relator's husband. They were living separate and apart, the wife being at the home of her parents. The district court, by its judgment, gave the custody of the child to the mother, but with the condition that she should allow the father to visit the child twice a week. The judgment also taxed the costs against the respondent. Upon the hearing the court took the testimony of a number of witnesses. It appeared that the child was between nine and ten months of age, and not in robust health. It would seem that it had been weaned, but that the mother was engaged, as she said, in the care and nursing and rearing of the infant. Her parents, with whom she was living, were supplying the wants of the mother and child, and were able and willing to continue so to do. There was testimony by relator and respondent as to the cause of their separation, each claiming the other to be in fault, but there was no claim made, and no attempt whatever to show, that the mother was a person of immoral character, or in any way unfit to care for the infant.

We are of opinion that the district court exercised a perfectly sound discretion in giving to the mother the custody of the child of such tender years, and so apparently in need of a mother's attention. Indeed, there is no very serious contention by the appellant upon this part of the case. He urges, however, that the court erred in taxing against him the costs of the proceeding.

The Code of Civil Procedure provides, in reference to costs, as follows: "Costs may be allowed, of course, to the plaintiff, upon a judgment in his favor, in the district court, in the following cases: Fourth, in special proceedings in the nature of an action." (Code Civ. Proc., § 495.) "A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 238.) The disposition by the district court of the application for a writ of *habeas corpus* was a judgment. It was the final determination of the rights of the parties. That judgment was in favor of the relator. The question, then, is, whether this is a judgment in a special proceeding in the nature of an action. (Code Civ. Proc., § 495.) If such, it would seem that the costs should be allowed the relator. We are of opinion that the proceeding upon *habeas corpus* is in the nature of an action. There are parties to the proceeding. In practice they are not usually called "plaintiff" and "defendant," but "relator" and "respondent"; but we do not consider that this matter of the names of the parties in the title of an action is important. Anderson's Law Dictionary defines an action as follows: "The lawful demand of one's right (3 Bla. Comm. 116) in a court of justice. (*McBride's Appeal*, 72 Pa. St. 483.)" Another definition in the same dictionary is: "An action or suit is any proceeding for the purpose of obtaining such remedy as the law allows." The definition cites *Harris v. Phoenix Ins. Co.*, 35 Conn. 310. In that case the court, speaking of "suit" or "action," says: "But by a suit, within the meaning of this provision of the policy [of insurance], is more clearly meant any proceeding in the court for the purpose of obtaining such remedy as the law allows a party under the circumstances." Black's Law Dictionary, under the title of "Action," gives this definition: "The legal and formal demand of one's rights from another person or party, made and insisted on in a court of justice."

In the Milligan Case, 4 Wall. 112, which was a *habeas corpus* proceeding, Mr. Justice Davis, delivering the opinion of the court, said: "In any legal sense, 'action,' 'suit,' and 'cause' are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceed-

ing which he set in operation for that purpose was his ‘cause’ or ‘suit.’ It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges, nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But the true meaning of the term ‘suit’ has been given by this court. One of the questions in *Weston v. City Council of Charleston*, 2 Pet. 449, was whether a writ of prohibition was a suit; and Chief Justice Marshall says: ‘The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him.’ Certainly, Milligan pursued the only remedy which the law afforded him. Again, in *Cohens v. Virginia*, 6 Wheat. 264, he says: ‘In law language, a suit is the prosecution of some demand in a court of justice.’ Also, ‘to commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand.’ When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes v. Jennison*, 14 Pet. 540, was whether, under the 25th section of the judiciary act, a proceeding for a writ of *habeas corpus* was a ‘suit.’ Chief Justice Taney held that, ‘if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty.’ There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the judiciary act, the proceeding by *habeas corpus* was a suit, was not controverted by any except Baldwin, Justice, and he thought that ‘suit’ and ‘cause,’ as used in the section, mean the same thing.” (*Ex parte Milligan*, 4 Wall. 112, 113.)

Under these views of the word “action,” and especially the opinion of the United States supreme court as to a *habeas corpus* proceeding, we are satisfied that subdivision 4 of section 495 of our Code of Civil Procedure is applicable to the inquiry in hand; that is to say, that this *habeas corpus* matter is a special proceeding in the nature of an action. It is a proceed-

ing to determine between these parties the right to the custody of their infant child. Referring to one of the definitions above cited, it is a "proceeding for the purpose of obtaining such remedy as the law allows." The result of the proceeding is the judgment which we are reviewing, and section 495 says that upon such judgment, in such special proceedings, costs shall be allowed to the plaintiff. We cannot believe that the fact that the prevailing party is called "relator" instead of "plaintiff" is of any importance. The sense of the word "plaintiff" is that the person so called is the complaining party, the party who is coming into court asking for rights which he claims. That is what the relator does in this proceeding, and we believe that the spirit and intention of section 495, when it uses the word "plaintiff," is to include such complaining and demanding party as the relator in a *habeas corpus* proceeding, even though by custom he is called by a name other than "plaintiff."

The judgment of the district court is therefore affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD J., concur.

13	306
16	461
13	306
18	255
18	542
13	306
23	835
18	306
24	401

STATE EX REL. PIGOTT, APPELLANT, v. BENTON, RESPONDENT.

[Argued April 11, 1893. Decided September 5, 1893.]

PRACTICE.—*Nonsuit*.—Upon a motion for a nonsuit that which the evidence tends to prove will be considered as proved.

ELECTIONS.—*Evidence—Certificate of nomination*.—A certificate of nomination to an office by a political party, regular on its face and filed with the proper officer as required by section 4 of the Montana ballot law (act of March 12, 1889), is a *prima facie* evidence of the nomination of the person whose name appears upon the official ballot as the candidate of that party.

SAME.—*Same*.—Where a political convention delegated to a committee the power to nominate a candidate for an office, evidence by the secretary of such committee who certified such nomination to the proper officer, that he was not present at any meeting of the committee when a formal resolution was offered and a vote taken for the nomination of a candidate for such office; that he was present at a committee meeting when such candidate received the nomination, but could not name the particular meeting; that such meeting was held at several places, several committee-men being present; that several meetings were held at which such candidate's name was decided on, but no written minutes were kept, is insufficient to overthrow the *prima facie* evidence of the certificate of nomination. (HARWOOD, J., dissenting.)

13	306
27	535
13	306
28	6
13	306
30	53
20	834
13	306
29	838

SAME—Convention.—The Montana ballot law does not forbid a political convention from appointing and delegating to a committee power to make nominations for office, and a nomination made by such committee after the adjournment of the convention is in effect the act of the convention and therefore valid. (HARWOOD, J., dissenting.)

Appeal from Eighth Judicial District, Cascade County.

Action for usurpation of office. The cause was tried before ARMSTRONG, J., sitting in place of BENTON, J., disqualified. Judgment for respondent on nonsuit. Affirmed.

Statement of the case by the justice delivering the opinion.

This action is one for usurpation of office. The relator alleges and proves facts which he claims are sufficient for a judgment, to the effect that respondent is not entitled to the office of judge of the eighth judicial district of this state, and that relator is entitled to said office, and that he be put into possession of the same. (Code Civ. Proc., c. 5, tit. 10, §§ 410—417.) At the general election in November, 1892, the relator and the respondent were candidates, and received votes, for the office of district judge. The relator was regularly nominated for the office by the Democratic convention. His nomination was duly certified to the county clerk, and his name properly placed upon the official ballot as the candidate of the Democratic party. As such candidate he received votes. These matters were all regular, and as to them there is no contention. There is also no contention that respondent was regularly nominated by the Republican convention. His nomination was duly certified to the county clerk, and his name was properly placed upon the official ballot, and votes were given to him as such candidate. Respondent's name also appeared on the official ballot as candidate of the People's party. The official ballot, therefore, presented the following appearance:

District Judge, Eighth Judicial District.

Vote for one.

Benton, Charles H., People's Party.

Benton, Charles H., Republican.

Pigott, W. T., Democrat.

At the election, Pigott, Democrat, received some 1,348 votes; Benton, Republican, 1,183; and Benton, People's party, 280.

Benton's vote, as Republican and People's party, together, gave him a majority over Pigott. If his People's party votes were not counted, he had not a majority over Pigott, and not a majority of all the votes cast and counted. The canvassing board counted for Benton his Republican and People's party votes. He was declared elected. He received his commission from the governor. He qualified as judge, assumed the office, and has been acting as judge down to the time of the commencement of these proceedings. The relator took the oath of office as judge, but has never acted as such. At his relation this action is commenced. He claims that respondent was not elected, but has usurped the office, and is now an intruder therein. Relator's whole case rests upon his attempted showing that the People's party votes cast and counted for Benton were illegal, and that they were illegal because Benton was not nominated by the People's party. Their alleged illegality rests upon the following facts: On September 3, 1892, the People's party convention was held. At the session of the convention no person was named by the convention as candidate for district judge. As to that office the minutes of the convention, introduced in evidence, show the following proceedings:

" McKay offered a motion of a vote of confidence in Judge Benton, of this district. Carried.

" County Committee:

" JEFF CAMPBELL.	}	Gt. Falls.
" D. MCKAY.		
" HARRY DICKERSON.		
" S. PORTER.		
" FRANK MARION.	}	Sandcoulee.
" HARRY McLAUGHLIN.		
" JOHN GILLEN.		

" Mtn. Present county com. be empowered to add to county central com. from other precincts. Carried. Mtn. County or executive committee be empowered by this convention to fill all vacancies that now exist, or may hereafter occur. Carried.

Mtn. to adjourn. Carried.

" G. L. WALES, Secty."

The case was tried before Hon. F. K. Armstrong, judge of the ninth judicial district, presiding upon the trial of the case,

without a jury. Upon the trial, the county clerk and recorder of Cascade county, being called as a witness, produced the People's party certificate of the nomination of Charles H. Benton, which was filed in his office, which is as follows:

"There being a vacancy on the ticket of the political party known as the 'People's party,' in the office of district judge, eighth judicial district of Mont., the executive committee of Cascade county of the People's party did, on the seventh day of October, 1892, nominate Charles H. Benton, residence, Great Falls, Mont., business judge of the eighth judicial district of Mont., address, Great Falls, Mont., for the office of district judge of the eighth judicial district of Mont. The nomination was made by the executive committee of said People's party, who were authorized to, and had the power delegated to them, to fill vacancies by the convention of said party, duly assembled and organized, and the cause of such vacancy in the office of district judge of the eighth judicial district was because such People's party convention did not nominate a candidate for such office. DANIEL MCKAY, Chairman of the Executive Committee of the People's party.

Resides at Great Falls, Mont. Business, contractor. Business address, Great Falls, Mont.

"GEORGE L. WALES,
Secretary of Executive Committee of the People's party. Residing in Great Falls, Mont. Business, harnessmaker.
Business address, Great Falls, Mont."

George L. Wales, secretary of the executive or county committee of the People's party, was called as a witness by the relator. As to the nomination of Benton by the People's party, he testified as follows: "I am engaged in the harness and saddlery business. I reside at 405 First avenue, south, in the city of Great Falls. I was the secretary of the People's party convention held in Cascade county last fall, which nominated some men for county offices. Question. That was the only People's party convention held? Answer. That I was present at. Q. Will you answer the question? Was that the only People's party convention that was held? A. That I was present at. Q. I have asked you whether that was the only People's party convention held? A. So far as I know.

Q. Don't you know there was not another one held? A. I can't say. Q. You were here all the fall? A. Yes, sir. Q. You were the secretary of that convention? A. Yes, sir. Q. If another convention had been held, would you have known of it? A. I think I might. Q. Were you a member of the county committee that called it? A. No, sir. Q. Were you a member of the county committee that did appoint. A. No, sir. Q. Did the convention appoint a county committee? A. Yes. [Witness shown paper.] This paper contains the minutes of the convention. [Paper marked 'Exhibit B' for identification.] These minutes were written by myself, and at the time. No additions were subsequently made. I wrote them on two pieces of paper. I took down notes as we went along, and copied them on another piece of paper. Q. Was this the copy that you made? A. At the convention; at the time of the convention. Q. No proceedings were taken except those set forth in the minutes? A. That was the main points. Q. These were the nominations made so far as they were made, and the resolutions adopted so far as resolutions were adopted? A. Yes. I have seen the certificate of nomination which has been introduced in evidence, and which you now show me. [Witness shows the certificate of nomination already introduced in evidence.] This paper bears my signature as secretary of some executive committee. The executive committee consisted of Mr. McKay, myself, Mr. Porter, Mr. Campbell, and Williams. I believe they were the originals. Q. Of the executive committee? A. Yes. Q. By whom was the executive committee appointed? A. I do not know. That executive committee was not appointed by the county convention. Q. And you do not know by whom it was appointed? A. I was not present at the time, and I do not know by what authority the gentlemen named assumed to act as the executive committee, not being present at the time the committee was created. Q. Were you present at any meeting of the committee at which Judge Benton received the nomination? A. Yes, sir. Q. Where was that meeting held? A. At several places. Q. State the places. A. Sometimes one place, and sometimes another. The first was in the convention. Q. That was not the committee meeting. Confine yourself to this meeting of

the alleged executive committee that professes to have nominated Judge Benton. A. We met sometimes in McKay's office. Q. Who met at McKay's office, and when? A. I did not keep the dates; we met too often. We met at McKay's office as an executive committee. Mr. McKay, Campbell, Porter, and sometimes Holmes were present; at other times, different members. Q. I would like to know something about this particular time. A. I can't say. Q. Were you ever present at any meeting of the executive committee at which a vote was taken or resolutions adopted providing for the nomination of Judge Benton? and I will ask you next where it was, if there was such a meeting? A. No, sir. Q. Then it is a fact, or is it a fact then, that the information which you had which led you to sign this certificate of nomination concerning any action taken by the executive committee was conveyed to you by hearsay—that is, by some person who professed to be present? A. By the members of the committee. Q. Which members? A. McKay, Porter, and Campbell." Witness continuing: "I signed that document—this certificate—at the courthouse here in Judge Benton's office. McKay, myself, Holmes, and Judge Benton were present at that time. I can't say who prepared the document for execution. It was not prepared by Judge Benton in my presence. I believe that this meeting took place in Judge Benton's office, when this paper was signed, on the seventeenth day of October, which was the last day that the certificate could have been filed. I know that a certificate of nomination is required to be filed by law twenty days before an election, and this was the last day, as I figure it, upon which a certificate might be filed. Myself, Holmes, and McKay were present when it was signed, and we came to be present at the meeting. Knowing that the nomination had not been put in, Mr. Holmes sent for me, and told me that the time was up, and we would have to put it in. Q. You came up there because Mr. Holmes called you? A. I expected to be called upon whenever the document was ready. I was notified by Mr. Holmes to come down with McKay. McKay came to the store after me. He dropped into the store, and told me to come up some time."

Cross-Examination.

"Question. You speak of the original committee, I believe, in reply to Mr. Shores, the executive committee. Was anyone added to that committee after the convention, and, if so, who was it? [Relator objects to the question as incompetent. No authority was given by the convention to make any change in its committees.] Answer. Mr. Holmes, who lives here in Great Falls. Q. Then I will ask you if Mr. Holmes was a member of that committee at the time of nomination of Judge Benton. A. He served as such. It is rather a difficult question for me to answer whether I had any notice to be at that meeting which nominated Judge Benton, because we had so many meetings. I know of several meetings where Judge Benton's name came forward. Q. Was he nominated more than once? A. It was decided on several times. Q. You may state whether you were present at a meeting where it was decided that he should be the nominee of the People's party. A. Yes, sir. Q. Who else was present? A. Mr. McKay, Porter, and Campbell. There may have been others around. I know we were there. I concurred in this nomination, and signed the certificate.

Redirect Examination.

"It was reported to me that Holmes was added to the executive committee. I was not present at any meeting where he was appointed, or when anybody appointed him or added him. I do not know who had got added, except as somebody told me who had been added to the executive committee. I was informed of it, and he served as such. That is all I know about it. I do not know who appointed him. I do not know whether McKay appointed him. There was a meeting one time, at which McKay, Holmes, and myself were present, at Dan McKay's office. I happened to go there because we had a regular—not a regular meeting, but an irregular meeting. I did not happen to be there. We went there for a purpose. We were notified by Mr. McKay. He met me on the street, and said, 'Come over to my office; meeting to-night.' That is all he said, and I understood it, and where the meeting was to be held, but I did not know what it

was for. I went down to McKay's office at that time. Question. How long was that before the certificate of nomination was made? Answer. From September 27th down to election day. Q. You were there all that time? A. No, sir. Q. I am asking you how long this meeting was held prior to the time of making this certificate of nomination. A. I cannot tell; there were so many meetings. Q. There is one particular meeting about which you have testified when you and three others were there. When was that held? A. I can't say. No minutes were kept. This was before the certificate was filed. Maybe two or three weeks, or it might have been a month, before. Q. Do you mean to say that you have no recollection upon the subject? A. No date. I can't tell the date. We kept no minutes of our meetings. The other business that we did was, we discussed finance. Q. Did you make up your minds to sell the nomination for the People's party? [Defendant objects to the question; that it is immaterial and irrelevant, and not an examination in chief.] Mr. Shores: I insist upon the question, and ask, further, did you at that time determine to sell the nomination, and fill in the nomination, including the office of district judge, clerk, and recorder, and so on? [Defendant objects further to the question, upon the ground that it is not justified by the pleadings in this case, and would be immaterial and irrelevant if foundation had been laid, which objection was sustained by the court, to which ruling of the court in sustaining said objection the relator then and there duly excepted at the time.] Witness continuing: Q. Who at that meeting, if anybody, proposed that Judge Benton be nominated for this office? A. I think the whole of them present spoke of it. Q. Was it at that meeting determined to nominate him? A. I can't say whether it was at that meeting fully determined. Q. Do you mean to say that at that meeting the subject was discussed, and favorably discussed? A. It was always favorably discussed. Q. Let us have a definite answer, if you can give it, to the question whether at that time and meeting held in Dan McKay's office—whether or not it was definitely decided to put Judge Benton in nomination. A. I can't answer that question. Q. Will you please refer to any other meeting at

which the propriety or advisability of nominating Judge Benton was under consideration? A. I can't name any individual meeting. Q. I take it that you are unable to point out any particular meeting at which it was determined to nominate Judge Benton? A. Yes, sir. Q. That you had in that and in various conferences over the matter favorable discussion—that is about the substance of it. A. Yes, sir. Q. And, on the day that this certificate was executed, you were requested by Dan McKay to come over to the courthouse, and did so, and affixed your signature to the certificate? A. Yes, sir. I came to the courthouse. This is about all that I know about the nomination of Judge Benton. After his appointment, Holmes acted with the committee as a member of the executive committee. I was present at several meetings where Mr. Holmes was."

The only other witness called by the relator was Judge Benton, the respondent, whose evidence is not material to the views expressed in the opinion below. Upon the close of the testimony for the relator, the court granted a motion for nonsuit, and entered judgment for respondent, and held that he was entitled to the office of judge. The relator appeals from that judgment.

Ransom Cooper, and Arthur J. Shores, for Appellant.

I. Every question arising in the case at bar, with one exception, was determined by the supreme court of Montana in *Price v. Lush*, 10 Mont. 61, in favor of appellant. The one question remaining is embodied in the following proposition:

The committee of a party convention has no authority to nominate a candidate for public office unless the convention made an original nomination for that office, and a vacancy is occasioned by the death or declination of the nominee, or by the insufficiency of the certificate of the original nomination. No committee may be empowered to fill a vacancy left by a party convention.

That this is the law is clear, and is demonstrated to a certainty by sections 3, 4, 5, 11, 12, and 13, of the Act concerning Ballots and Voting, approved March 13, 1889. Section 2 provides the only methods by which nominations can be made.

These methods are three in number: 1. By a convention of delegates representing a political party; 2. By a primary meeting duly organized representing a political party or principle; 3. By electors to a certain number. Section 3 points out the method of certifying nominations made by a convention or primary meeting. Section 4 names the officer with whom the nomination shall be filed. Section 5 provides a means whereby nominations shall be made other than by a convention or primary meeting. When this method is pursued the certificate shall contain the same information as is required to be given in section 3, and shall be signed by not less than ten electors residing in the district, and when filed shall have the same effect as a nomination by a convention or primary meeting. This may properly be called the independent method. The candidate thus nominated is entitled to a place upon the official ballot as a candidate, but without any name or description appended. Section 11 prescribes how any one nominated in any of the three ways may decline the nomination. Section 12 is that upon which defendant relies for his nomination. In words whose meaning is susceptible of but one construction, it is therein provided: In case the person nominated, as in one of the three methods pointed out in sections 2, 3, 4, and 5, dies before the printing of the tickets, or declines the nomination as provided for in section 11, or in case the certificate of nomination be or become insufficient or inoperative, the vacancy thus occasioned, to wit, by declination or death, or the insufficiency of the certificate, may be filled in the manner required for the original nomination; that is to say, in one of the three ways specified. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, the committee acting for and representing the convention may, in power of the convention, upon the declination or death of the original nominee, or upon the certificate of his nomination being or becoming inoperative, fill the vacancy; the convention, acting through its special agent of limited and defined authority, may in such case make a substitute nomination, but only upon the occurring of the vacancy is the committee permitted to act. The certificate of the committee, in addition to other matters,

must set forth the name of the person for whom the new nominee is to be substituted, and the cause of the vacancy. No nomination was made by the People's party convention. There was neither death nor declination, nor did any original certificate become insufficient or inoperative, for the excellent reason that none was in existence. The paper claimed to be a certificate of nomination could not comply with the law; it did not state the cause of the vacancy, because no vacancy had occurred; it did not set forth the name of the original nominee for whom defendant was to be substituted, because no person had been nominated. While the statute is self-interpreting, authority is not wanting upon the question. No court has held to the contrary of the opinion given in *Lucas v. Ringsend* (S. D., Oct. 28, 1892), 53 N. W. Rep. 426. (See, also, *Price v. Lush*, 10 Mont. 61.)

II. Defendant was not *de facto* nominated by the committee. The record shows that he was not. It is in evidence that the certificate of nomination was executed in the presence of defendant and one Holmes by McKay and Wales. Neither Wales nor Holmes was a member of the county committee. The executive committee was supposed to consist of six members, including Holmes. This committee, it seems, was appointed by some person or persons unknown. It was not the county committee which alone had authority to add to the county central committee from other precincts only. Holmes lived in Great Falls precinct. So it appeared in evidence that, by taking either horn, defendant suffered impalement. If contending that the nomination was made by the county committee, it affirmatively appears that such could not be the case for three reasons: 1. One member only—to wit, McKay—took any part in such pretended nomination. Neither Wales nor Holmes was a member, nor could either be added to it; 2. The county committee did not even pretend or attempt to make the nomination, nor do the pleadings aver such proceeding, but the contrary; 3. At no time did that committee meet to consider the nomination. If contending that the executive committee made the nomination, as he must under his answer and the certificate, he is confronted with three reasons which effectually silence that pretense: 1. A subcommittee appointed

by the county committee was without right to nominate; 2. Conceding the power of this subcommittee to nominate, and conceding that Holmes was a member of it, yet a majority did not concur in the nomination of defendant; 3. It is clear the convention did not empower the executive committee to fill vacancies. It would seem to have used the words, "county or executive committee," as meaning the same body, using the words interchangeably.

III. Neither plaintiff nor relator is estopped from showing that the so-called nomination of the defendant by the executive committee of the People's party is void, nor has either waived any right in the premises. This question arose and was necessarily determined in *Price v. Lush*, 10 Mont. 61. If the ruling announced in that case was not satisfactory to the legislature, it would have been abrogated by statute. (*District of Columbia v. Woodbury*, 136 U. S. 450; *Sullivan v. City of Helena*, 10 Mont. 145.) In this state there seems to be little, if any, doubt of the right of the candidate to go on the ballot as often as he receives party nominations. (*Fisher v. Dudley*, 74 Md. 242; *State v. Stein*, 35 Neb. 848.) The sole effect of section 19 of our ballot law is to permit the correction of errors occurring in the publication of the names or descriptions of the candidates nominated for office, or in the printing of ballots, which corrections must be made by the certificates—that is to say, the published lists and ballots must be made to conform to the certificates. (*Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491.) Defendant contends that the power conferred by the section is judicial. We say that whatever power is given is ministerial only. If the power attempted to be conferred is judicial, the section to that extent is in conflict with the organic act limiting the jurisdiction of the probate court to certain matters, and is void. (*Ferris v. Higley*, 20 Wall. 375.) If the functions to be exercised be ministerial merely, the act was valid under the organic act, but must have been abrogated by the constitution, which defines the three departments of government and limits the powers of courts to things judicial. It was not the duty of the relator or the people to attack the void nomination by *mandamus* or prohibition before election.

There was present no element of estoppel; nothing has been

done or omitted to be done which the law demanded should not be done or omitted; no one has been misled, not even defendant, who had actual and full knowledge of all the proceedings whereby his name appeared upon the ballot as the candidate of the People's party. The nonaction of relator could not destroy the interest or right of the public. In sections 10, 15, and 17 of the ballot law are found provisions effectually disposing of this question. (*Johnston v. State*, 128 Ind. 16; 25 Am. St. Rep. 412.) See, also, as having a bearing upon the questions before the court, *Keller v. Toulme* (Miss., May 6, 1890), 7 So. Rep. 508; *Chateau v. Jacob*, 88 Mich. 170; *Shields v. Jacob*, 88 Mich. 164; *People v. Shaw*, 133 N. Y. 493; *State v. McElroy*, 44 La. Ann. 796; 32 Am. St. Rep. 355; *Talcott v. Philbrick*, 59 Conn. 472; *Fields v. Osborn*, 60 Conn. 544; *In re Vote Marks*, 17 R. I. 812; *State v. Black*, 54 N. J. L. 446; *West v. Ross*, 53 Mo. 350; *Ledbetter v. Hall*, 62 Mo. 422; *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312; *State v. Frazier*, 98 Mo. 426; *State v. Minar*, 13 Mont. 1; *People v. Board etc.* 129 N. Y. 395.) A court of law ought not to be influenced or governed by any notions of hardship. Cases may require legislative interference, but judges cannot modify the rules of law. (*Rhodes v. Smethurst*, 4 Mees. & W. 63; *West v. Ross*, 53 Mo. 350.)

Leslie & Downing, and *Berry & Tuttle*, for Respondent.
B. Platt Carpenter, and *Preston H. Leslie*, of Counsel.

I. The objection of the relator should have been taken or made before the election. (Ballot Law of 1889, §§ 4, 8, 10, 15, 19; *Bowers v. Smith* (Mo., Nov. 9, 1891), 17 S. W. Rep. 762; *Allen v. Glynn*, 17 Col. 338; 31 Am. St. Rep. 304; Bigelow on *Estoppel*, 5th ed., 687; *People v. Waite*, 70 Ill. 25; *State v. Le Sueur*, 103 Mo. 253; High on Extraordinary Legal Remedies, § 631, citing *Regina v. Lockhouse*, 14 L. T. R., N. S., 359; *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491; *Northoote v. Pulsford*, 32 L. T. R., N. S., 602; *Miller v. Pennoyer* (Or., Jan. 2, 1893), 31 Pac. Rep. 831; *Burgess v. Donaldson*, 22 Nova Scotia Rep. 155; *Regg v. Bradford*, 6 Ont. Pr. Rep. 304.) The question of estoppel did not enter

into the case of *Price v. Lush*, 10 Mont. 61, cited by relator. In that case only one nomination was made.

II. If for every error of a county clerk or harmless irregularity in election proceedings, citizens having no control over either are to lose their rights of choosing public officers, the reform ballot act, instead of being an improvement of the machinery of popular government, will justly be denounced as "a snare to entrap the unsuspecting voter." (*Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312.) When any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the act. (*People v. Board etc.*, 129 N. Y. 395.) While it is well enough to insist upon a proper and strict performance of duty by officers conducting elections, we are not of the number of those who imagine that such performance will be promoted by disfranchising the whole body of electors in any locality, when errors such as are here charged occur. The legislature has not plainly declared such a purpose, and we think it should never be imported into a statute by construction. (*Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491.) It is the duty of the courts to give to the statute a construction most favorable to its life and purpose, and not to give a forced construction, which would, under the statute, be unreasonable and unconstitutional. (McCreary on Elections, 3d ed., 190-92; Cooley on Constitutional Limitations, 778; Sutherland on Statutory Construction, §§ 322, 323, 331, 332, 447, 452-54.)

All statutes tending to limit the citizen in his exercise of this right "of suffrage" should be liberally construed in his favor. (*Owens v. State*, 64 Tex. 509.) It is proper and often necessary to consider the effects and consequences of a proposed interpretation of a law to ascertain what is probably its true intent. (*State v. Hope*, 100 Mo. 347.)

If the nomination of Judge Benton had been carried out with all the technical nicety desired by the relator, the result of the election would have been the same. Irregularities which do not affect the final result, or, in other words, do not produce a different result from that which would have otherwise hap-

pended, are not vicious. (*Brightly on Elections*, 357; *Whipley v. McKune*, 12 Cal. 353; *Farrington v. Turner*, 53 Mich. 27; 51 Am. Rep. 88; *People v. Cook*, 14 Barb. 290; *Todd v. Steward*, 14 Col. 296; *Soper v. Sibley Co.*, 46 Minn. 274; *Lehlbach v. Haynes*, 54 N. J. L. 77; *Stinson v. Sweeney*, 17 Nev. 309; *Cleland v. Porter*, 74 Ill. 76; 24 Am. Rep. 273; *Piatt v. People*, 29 Ill. 72; *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767.)

Innocent irregularities of election officers which are free of fraud, and which have not prevented a full and free or fair expression of the popular choice, will not vitiate the result of an election, unless the legislature has expressly so declared. (*Bowers v. Smith*, 17 S. W. Rep. 761; *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312; *Davis v. State*, 75 Tex. 420; 6 Am. & Eng. Ency. of Law, 325; *Fowler v. State*, 68 Tex. 30; *People v. Schemmerhorn*, 19 Barb. 540.)

It is only those provisions of the statute relating to the time and place of holding elections, the qualification of voters and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory; all others are directory merely, and a failure to observe them, caused by honest ignorance and mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of a precinct. But, on the other hand, it is equally well settled that neglect of directory provisions of a statute designed to prevent fraudulent voting, followed by actual fraud of a character sufficient in extent to throw doubt on the result of the election, is ground for rejecting the vote of a precinct if there is no means of purging the poll. (*Russell v. McDowell*, 83 Cal. 77; *Stinson v. Sweeney*, 17 Nev. 309; *Contested Election of E. R. Wheelock*, 82 Pa. St. 299.) The principle is universal that honest mistakes or omissions on the part of election officers, or irregularities in directory matters, even though gross, if not fraudulent, and there is no pretense of fraud in the case, will not avoid the election unless they affect the result. (*State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46; *McKinney v. O'Connor*, 26 Tex. 5; *Jones v. Caldwell*, 21 Kan. 186; *Dobyns v. Weadon*, 50 Ind. 298; *Lee v. State*, 49 Ala. 43; *Weaver v.*

Given, 1 Brewst. 140; Farrington v. Turner, 53 Mich. 72; 51 Am. Rep. 88, and cases cited.)

When the election is fair and honest, courts will not disfranchise the voters unless compelled to do so by the peremptory requirements of the law. (*Daly v. Petroff*, 10 Phila. 389; *Wells v. Taylor*, 5 Mont. 208; *Byrum v. Peterson*, 35 Neb. 237; *State v. Van Camp* (Neb., Jan. 17, 1893), 54 N. W. Rep. 116; *Lindstrom v. Board etc.*, 94 Mich. 467.) As to the irregularities of election officers, see *Wells v. Taylor*, 5 Mont. 208; *Wildman v. Anderson*, 17 Kan. 347; *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491; 16 Lawyer's Rep. Ann. 754, note; *Preston v. Culbertson*, 58 Cal. 198; *People v. Bates*, 11 Mich. 362; 83 Am. Dec. 745; *Byrum v. Peterson*, 35 Neb. 237; *Allen v. Glynn*, 17 Col. 338; 31 Am. St. Rep. 304; *Weil v. Calhoun*, 25 Fed. 865. When the same party is on a ballot twice, it should be counted as a vote. (*People v. Holden*, 28 Cal. 137; Brightly on Elections, 267; *Behrensmeyer v. Kreitz*, 135 Ill. 591.)

III. It is contended that the committee of a party convention has no authority to nominate a candidate for public office, unless the convention made an original nomination for the office, and a vacancy is occasioned by death or declination of the nominee, or by the insufficiency of the certificate of the original nomination. The statute has failed to provide for just such an emergency as this, and we are inclined to think the legislature never intended to undertake to regulate the proceedings of nominating conventions in detail. They are left free to proceed in their own way. And we think they would have the power to meet in convention as was done in this case, nominate a part of its ticket, appoint a committee and authorize that committee by resolution to supply places left vacant by the convention, and we believe the committee, in obedience to this authority thus conferred by the convention, can supply such omissions, and when so done it is the original act of the convention putting the machinery in motion to carry out its will.

IV. Section 23 of article 5 of the constitution provides: "No bill except general appropriation bills and bills for the codification and general revision of the laws shall be passed,

containing more than one subject, which shall be clearly expressed in its title, but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed."

Turning to the act of 1889 in question, we find it entitled, "An Act to Provide for Printing and Distributing Ballots at the Public Expense and to Regulate Voting at Territorial and Other Elections." So much of the law in question as relates to nominating conventions not having been expressed in the title of the act in question is void, otherwise plain language does not mean what it says. (*State v. Cantiney*, 34 Minn. 1; *Astor v. Arcade Ry. Co.*, 113 N. Y. 93; *Montgomery v. State*, 88 Ala. 141.)

DE WITT, J.—As appears by the statement of the case above, the material point of the relator's contention was that respondent was not nominated by the People's party, and if not so nominated, the People's party votes cast for him were illegal votes, and he had not enough legal votes to elect him.

Upon a nonsuit, that which the evidence tends to prove will be considered as proved. (*Creek v. McManus*, *ante*, p. 152, and cases cited.) Did the evidence on the trial tend to prove that respondent was not nominated by the People's party? The name of Charles H. Benton as candidate of the People's party appeared upon the official ballot. (Ballot Laws, § 17, p. 139, 16th Sess., 1889.) That name so appeared because a certificate of nomination had been filed with the county clerk, and recorded. (*Supra*, § 4.) That certificate was signed by the chairman and secretary of the executive committee of the People's party. It is held that a certificate of election is *prima facie* evidence of the election of the person to whom the certificate is issued. (*State v. Kenney*, 9 Mont. 223.) By analogy we are of opinion that it should be held that a certificate of nomination, regular upon its face and filed with the proper officer, is *prima facie* evidence of the nomination of the person so certified. Therefore when it appeared, as it did, that such certificate of Benton's nomination by the People's party was executed and filed with the county clerk and recorder; that his name was thereupon placed upon the official ballot as candi-

date of the People's party; that he was voted for as such; that those votes so given him gave him a majority of all the votes cast; that he was declared elected by the canvassing board; that he was commissioned by the proper authority of the state; that he qualified as judge and is acting as such, then I am of opinion that the relator entered upon this contest facing the *prima facie* evidence that respondent was nominated by the People's party. If respondent was nominated by the People's party, then there is an end of relator's case. Did relator's evidence overcome this *prima facie* situation; that is, did his evidence tend to show that Benton was not nominated by the People's party? The case went no further than relator's evidence. Benton was not yet before the court, on the trial, undertaking to combat testimony that he was not nominated. He was waiting for the relator to introduce evidence tending to show that alleged fact.

We will now look at the evidence to ascertain whether it tends to show that Benton was not nominated by the People's party. The district court held that it did not, and hence the nonsuit. The only witness whom relator called to establish this point in the case was the acting secretary of the People's party executive committee, namely, George L. Wales. His testimony on this point is set out in the statement of the case above, in full, as it appears in the record. It seems that this committee, as created by the convention, consisted of seven original members, Campbell, McKay, Dickinson, and Porter of Great Falls, and Marion, McLaughlin, and Gillen of Sandcoulee. The committee was empowered to add to their number persons from other precincts. Holmes and Wales, each from Great Falls, and not from other precincts, became members of the committee, or acted as such, by some method not appearing. But if they were added to the committee without direct authority from the convention, I cannot understand that such action would destroy the life of the committee, or nullify the authority given it by the convention. Moreover, it does not appear that it was required that the secretary of the committee should be a member thereof. I cannot understand how, if the duly constituted members of the committee should act as authorized by the convention, their acts would be void by rea-

original nomination for district judge had been made by the convention, and that such a committee can fill a vacancy only when such vacancy occurs from one of the causes mentioned in section 12—a vacancy by reason of there being no original convention nomination not being a vacancy contemplated by section 12, to be filled by a committee. The contention over this point has been very earnest, and very ably conducted, but I do not consider that the People's party nomination of Benton need be here tested by the provisions of section 12; that is, this nomination was not a substituted nomination, under section 12, but was rather an original one, made by the convention of the People's party. Whatever may be said in terms, in the pleadings or the evidence, to the effect that the convention did not nominate Benton, is not of importance. We may take all the facts before us, either admitted by pleadings or proved, and determine whether those facts may be properly construed as a nomination by the convention; that is, whether the act of the committee was, in effect and substance, the act of the convention. I am of opinion that such is the case. Suppose a political convention met, and there was before it the nomination of candidate for district judge. The convention appoints a committee to make the nomination. That committee retires. It returns to the convention, and reports that it decides to nominate Charles H. Benton. The convention receives the report, and adopts and ratifies it. Such nomination would certainly be the act of the convention, and the nomination would be the nomination of the convention. Such supposititious case differs from the facts in the case before us in only one particular: Instead of the convention ratifying the act of the committee after it was done, as above illustrated, it, in the actual case before us, ratified the act of the committee in advance, and did so expressly.

It gives the committee power "to fill all vacancies that now exist or that may hereafter occur." The vacancy in the position of candidate for district judge did "now exist" at the time of passing the resolution empowering the committee to make such nomination; for the convention had not named, and did not name, a person for district judge, except as it delegated power to name one to the committee. The conven-

tion represented the voters of the People's party. The convention had authority from the political organization known as the "People's party" to nominate a candidate for district judge. Instead of making that nomination in convention assembled, it made it through its delegated agent—the committee. What it was authorized to do it did in one way rather than another. I am of opinion that the Montana ballot law does not attempt to prescribe rules of order and procedure for political conventions. If it did, it would be a decidedly large undertaking. It is a matter of common knowledge that political conventions frequently operate just as this convention did; when it may seem not expedient at the session of the convention to make one or more nominations in the list of offices to be filled. The convention therefore leaves that duty to a committee selected by the convention, the committee having the trust and confidence of the convention, and the convention having the trust and confidence of the members of the party who elected it. I am not ready to conclude that the Montana ballot law intended to forbid conventions from operating in this manner by a selected committee.

Nor can it be contended that a political convention is inhibited by any organic law from delegating power to a committee. Why can it not do so? No answer to that inquiry presents itself to me. Such a convention is not, like a legislature, controlled by a constitution. It is not, like a municipal corporation, controlled by a charter. It is not, like a business corporation, created and governed by the law incorporating it. It is not a body bound by any organic law, like legislature, municipality, or business corporation. Therefore, rules as to the delegation of power, in my opinion, have no application to a political convention. I am not able to see any argument or reason why such a convention may not, if it pleases, do through a committee what it has power to do by itself. "*Qui facit per alium, facit per se.*" I am therefore of opinion that the nomination of Benton by the executive or county committee created by the People's party convention, and by that convention delegated the power to make the nomination, was, in substance and effect, a nomination by the convention. I therefore arrive at this result: The People's party convention nomi-

nated Charles H. Benton, the respondent. His nomination was certified to the county clerk and recorder. His name was properly placed on the official ballot. The votes cast for him as Republican and as People's party, together, gave him a majority of all the votes cast. He was therefore elected judge of the eighth judicial district, and the judgment of the district court should be affirmed.

This case is full of interesting and perhaps difficult propositions in reference to the construction of the ballot law of this state. The view taken above renders unnecessary the discussion of those points. The decision in this case is placed solely upon the ground discussed hereinbefore, and all other questions are reserved.

Affirmed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*dissenting*). My judgment is persuaded by careful consideration of this case that the decision just announced therein by a majority of this court is contrary to that demanded by the law and the evidence.

The law receiving construction and application as to its bearing in the regulation of conduct, is that recently adopted legislation concerning the manner of conducting general elections of public officers by the people of this state. This law, like many other legislative measures, comprises several prominent features, dependent upon one another in effectuating the purpose aimed at, and without the aid of either of which provisions the entire scheme would be weakened at least; or might fail altogether in the accomplishment of the purpose manifestly intended by its enactment. Thus, the legislature, to accomplish the purpose intended in the enactment of the statute under consideration, made provisions:

1. For the registration of legally qualified voters, whereby the disqualified who wrongfully seek to interfere in elections, and overcome the will of the *bona fide* citizens, are excluded.

2. Plain, reasonable, and just provisions for certifying to a public officer, nominations made by political parties, or by the requisite number of individuals concurring together; and the printing and delivery of an official ballot to each elector at

the polls, truly setting forth the nominations thus made, whereby (if such provisions are enforced) the elector is assured that the ballot thus placed in his hands truly expresses nominations, made, in fact, as represented therein; and thereby excludes false ballots devised to deceive, or detect the manner in which the elector exercises his suffrage.

3. Provisions which secure to the elector at the polls an opportunity for the free and independent expression of his will, by excluding from him the interference of agencies intended to coerce, unduly influence, deceive, or intimidate him in the exercise of his elective franchise.

The provisions of the statute plainly indicate that those objects, together with provisions to insure the honest counting and canvassing of the votes after the same have been cast, were mapped out in the legislative mind as necessary and concomitant features of the scheme of reform intended to be worked out by the legislative enactment; and the provisions of the statute are directed plainly to the accomplishment of those results. It is also apparent that to weaken or destroy the force or effect of either of those prominent features of the statute, by failing to give force and effect to the provisions enacted to accomplish such results, would derange and weaken, if not render abortive, the entire purpose of the law. While, on the other hand, a firm enforcement of its plain, reasonable, and just provisions, in no manner abridges, but insures the greatest freedom, safety, and certainty in the exercise and ascertainment of the will of the people, expressed through the ballot; because the law merely insists on truth and fidelity in respect to those conditions represented to the voter by the ballot, and demands the exclusion of agencies calculated to hinder, coerce, deceive, or intimidate the elector in the free and independent exercise of his will. It is in no manner a bold proposition to affirm that the people, with unanimity of sentiment, including all political parties, earnestly desire the firm maintenance of the plain intendment of this law by a just and reasonable enforcement of its provisions. For it was a measure of reform, demanded with emphasis, by a common sentiment and purpose on the part of the people to protect those precincts where the noblest and most sacred function of citizenship is exercised,

from the influence of corruption, coercion, deception, and fraud hitherto attending elections—a sentiment also shared by the people of many sister states, as manifested by recent legislative enactments. And the statute was received with general and unmistakable manifestations of approval by the people, as shown in the express sanction of provisions of that character, by a clause inserted in the constitution adopted by the people soon after the statute was enacted (Const., art. IX.); and by the further fact that several legislative sessions have convened since the adoption of this measure of reform, and one since the delivery of an opinion of this court in an important case, firmly maintaining a reasonable construction and enforcement of its provisions (*Price v. Lush*, 10 Mont. 61, a case directly bearing upon the questions here involved), yet the legislature has not interfered to remove or change the effect of those statutory provisions. And by virtue of this statute so upheld, a multitude of evil practices hitherto exercising a powerful and dangerous influence on elections have disappeared.

In the present case the inquiry is whether the provisions of this statute were observed in respect to placing the name of respondent on the official ballot as representing a nomination made by the People's party. His name was inserted in the official ballot once as the nominee of the Republican party for judge of said judicial district, and there is no contention as to the regularity of that nomination. But his name was again inserted in the official ballot as the nominee of the People's party, and as to this it is complained that it was done in disregard of the statute and without any such nomination in fact having been made.

It appears to be conceded that if respondent's name was inserted in the official ballot as such nominee, without the sanction of a nomination by such party, but in disregard of law and fact, then there is ground for complaint by the people, as instituted in this proceeding, and respondent would not be entitled to the fruits flowing from such a pretended nomination wrongfully inserted in the ballot. Such must necessarily be held, for to hold the contrary would operate practically to repeal or ignore or refuse effect to several sections of the statute; and such was the holding in *Price v. Lush*, 10 Mont. 61, a

case concurred in but not mentioned by the learned judge in delivering the majority opinion in the present case, although that case was forcibly pressed upon the attention of the court in the consideration of this. Nevertheless, the very retention and consideration of the present case necessarily involves the tacit holding that a good cause of action is stated. And that cause of action lies wholly in the proposition set forth in the complaint that Mr. Benton's name was inserted in the official ballot as the nominee of the People's party without the sanction of a nomination by that party. If, in the opinion of the court, a good cause of action was not stated, the case should have been dismissed for want of a complaint well founded in law and fact; but the court does not go directly to such a determination.

Much discussion is gone into in the opinion of the court to deny that it was the intention of the legislature in enacting the law under consideration to interfere with the action of political parties in making nominations or otherwise. This would seem to be labor in vain, for no one has insisted on any such proposition in the case, and such an intent seems to be entirely foreign to the terms, provisions, and object of the law in question. According to unquestioned history, it has, from time immemorial, been the habit of citizens to organize in political parties, including those of kindred views, and through such method as the party may adopt, ascertain and declare its will in the nomination of persons for public office or concerning public policy or the conduct of public affairs. In this manner the citizen, by immemorial custom, undertakes to exercise the unquestioned right of making his will known and felt, respecting public affairs. And the very genius of our form of government emphasizes that right, and all its history demonstrates its freest exercise.

The legislature, in framing the statute regulating elections, in its wisdom took into account those customary methods employed by the citizen and, leaving those privileges untouched, merely provides that when a political party does take action through a primary meeting of its electors or a convention of its delegates in an organized assemblage (Laws of 1889, § 2, p. 135), which results in the nomination of a person for elec-

tion to a public office, the same must be certified in a certain convenient manner prescribed, to a designated public officer, to be made known to the voter through the official ballot as the nomination of such party. The party is left by the legislature entirely free to act to the fullest extent that it may in its wisdom desire, through a convention of its delegates or a primary meeting of its electors. But having left such ample room for party action, the legislature did so provide that no other individuals or committees outside of the organized convention of delegates, or primary assemblage of electors of the party, can propose a nomination which will be recognized and published to the voter in the official ballot, as that of a political party, except only the subordinate and secondary action of a committee in filling a vacancy occurring in cases where the party had made an original nomination, which has become vacant by death, declination, or the ineffective condition of the original certificate of nomination. This the statute so plainly prescribes, both in its direct terms and also by reiteration, that no one has ventured, in this consideration, to bring those provisions into view, and deny that such is the effect thereof. The provisions upon this point are found in sections 2, 3, and 12 of the act, as follows:

“SEC. 2. Any convention or primary meeting, as herein-after defined, held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public office to be filled by election within the state. A convention or primary meeting, within the meaning of this act, is an organized assemblage of electors or delegates representing a political party or principle.”

“SEC. 3. All nominations made by such convention or primary meeting shall be certified as follows: The certificate of nomination, which shall be in writing, shall contain the name of each person nominated, his residence, his business, his business address, and the office for which he is named, and shall designate in not more than five words the party or principle which such convention or primary meeting represents, and it shall be signed by the presiding officer and secretary of such convention or primary meeting, who shall add to their signatures their respective places of residence, their business, and business

addresses. Such certificates made out as herein required shall be delivered by the secretary or president of such convention or primary meeting to the secretary of the territory or to the county clerk, as hereinafter required."

"SEC. 12. Should any person so nominated die before the printing of the tickets, or decline the nomination as in this act provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed in the manner prescribed for the original certificate of nomination, and shall have the same force and effect as an original certificate of nomination. When such certificate shall be filed with the secretary of the territory he shall, in certifying the nominations to the various county clerks, insert the name of the person who has thus been nominated to fill a vacancy in place of that of the original nominee. And in the event that he has already sent forth his certificate he shall forthwith certify to the clerks of the proper counties the name and description of the person so nominated to fill a vacancy, the office he is nominated for, the party or political principle he represents, and the name of the person for whom such nominee is substituted." (Sess. Laws, 1889, pp. 135, 136, 138.)

We are bound to give effect to the plain intent of the statute, and here the intent is so plainly manifest there is no room for interpretation, nor room for controversy that, according to the statute, the committee, in its subordinate sphere of action, must wait for the "occurring of such vacancies" in the "origi-

nal nomination" made by the party that appointed and empowered the committee to act in such event. The wisdom of the legislature in making this provision is manifest, and has been, and no doubt in the future will be, demonstrated. It protects political parties and electors alike. The very will and purpose of the party may be manifest by its omission to make nominations in certain cases. If I mistake not as to the course of recent events, this was notably illustrated in respect to a judicial office in the northern district of this state, and perhaps elsewhere, at the last election. But whatever may have been the reasons which moved the legislature to so frame said statute, the provision is nevertheless too plain to admit of disputation. The legislature did not so provide as to put it into the power of a small subordinate committee to reverse the purpose or policy of the party by independent original action. After inviting and providing for the insertion of all nominations in the official ballot, which any party may see fit to make through a "convention or primary meeting" of its party representatives, the law provides: "*Should any person so nominated die before the printing of the tickets, or decline the nomination, as in this act provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations.*" And proceeding, the section provides that: "*If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same.*" Could language be more explicit or the intention be more plainly expressed? It would seem not, except by reiteration, and the legislature in that way in the same section does explain its intention even more plainly, for in providing for the certificate of such nomination by the committee to fill the vacancy, the law prescribes that the certificate "shall set forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, *the name of the person for whom the new nominee is substituted.*" This could not be done where there had been no original nomination, and thus the committee undertaking to make original nominations would plainly observe that such

action was exceeding its province under the provisions of the law; and that, failing to comply with the statute, such action of the committee must be disregarded, or the law must be disregarded, in making and publishing the official ballot. This was an important question of law, ably pressed upon the consideration of the court by counsel for the people as bearing directly upon this case, because it was a fact admitted that a general convention of the People's party for the county comprising the judicial district in question was held, and made and certified certain nominations for offices to be filled at the ensuing election; but such convention did not nominate respondent or any other person for the office of judge of that judicial district. However, through certain actions of respondent and others (which will be examined below), the name of respondent was inserted in the official ballot as the nominee of the People's party.

But notwithstanding the law and the facts, what has the majority of this court determined by the judgment announced? The majority have determined that the committee may proceed to make original nominations in respects wherein the party convention was silent; and that it is proper for the county clerk, as a public officer, acting under the statute in this important matter, to receive and give effect to a certificate, filed by such committee, which does not, and could not, fulfill the requirements of the statute. By what process of treatment this extraordinary conclusion is reached, must be sought in the majority opinion. I have looked earnestly and carefully there, but fail to find the law brought into view, and discussed, or its provisions even referred to in the opinion.

The effort to make out that the committee in this case acted as if in the convention, and with the convention's ratification, cannot be maintained with even a specious show of reasoning, without doing violence to the distinction of terms used in the statute. In that way all law can be ignored, and any conclusion reached. There was a convention. This is admitted. The convention took such action as it desired, and dissolved. It appointed a committee—just such a committee as the statute describes—and that committee, and the alleged action thereof, long after the convention adjourned, is under consideration in

this case. The statute defines and describes the convention, and also the committee, and provides in plain terms what action of such committee would be recognized, and published in the official ballot, as the action of a political party. But the law—the statute relating to this important subject—appears not to have been discussed. Indeed this peculiar feature of the opinion seems to have strongly impressed its author, for the questions of law involved in the case are disposed of with the observation, which I quote from the opinion as submitted to me, that: "This case is full of interesting, and perhaps difficult propositions in reference to the construction of the ballot law of this state. The view taken above renders unnecessary the discussion of those points. The decision in this case is placed solely upon the ground discussed hereinbefore, and all other questions are reserved."

I do not find the lids of the statute book so unyielding, nor so unnecessary to be tried; nor its contents when opened, so "difficult" and mysterious.

No less remarkable, however, it seems to me, is the determination of the court in reference to the testimony introduced in the case, as shown by the record. The certificate of nomination, showing its failure to comply with the requirements of the statute, was exhibited in the complaint by copy. This certificate, the majority of the court hold, is *prima facie* evidence that respondent was nominated by the People's party as candidate for judge of that district. No greater faith could, under the rules and principles of law universally acknowledged, be given to such certificate if it complied with the requirements of the statute. But without even noticing its infirmity in that regard, so plainly pointed out and urged by relator, the court sets this certificate down as *prima facie* evidence of such nomination.

Now, granting for the further examination of the case, that this certificate is, at the commencement of the trial, *prima facie* evidence of such action of the committee. That faith and credit and consequent weight is given to such certificates because the law has delegated and authorized persons to certify facts for public record, who, by reason of their direct personal contact with the action of the committee in pre-

siding over its deliberations and ascertaining and recording its express will, have come into personal knowledge of the facts certified; and on further presumption of the law that a person delegated and invested by law with power to discharge a solemn public duty, would not so certify without personal knowledge of the truth of the matter set forth. Those are the reasons and presumptions which give the weight of *prima facie* proof to such certificates; and when the foundation of such presumption is removed by showing in the proper tribunal and proceeding that the certificate was made by the person appointed to certify, without personal knowledge that the matter certified was in fact true, thereby the certificate loses its *prima facie* weight, and is discarded as of no evidential weight. If there were no cases on this point to cite, reason alone would seem to be sufficient to draw a court to that conclusion; for what is my certificate worth as evidence, if I certify that certain action has been taken without personal knowledge thereof? What is such certificate worth as evidence to support the fact, if one having solemnly certified that such action had verily been taken, upon being called and questioned under the test of an oath, is compelled to admit over and over again that he was not a witness to the matter certified, and cannot, from the basis of such personal knowledge which every court would exact before admitting the witness to testify, say that the matter certified in fact took place. Not only the simplest principles of evidence and reason discard such a certificate on that showing, in a case where the facts can be inquired into; but the authority of decided cases also confirms the proposition that such certificate should be cast out of consideration when the ground upon which faith and credit is given to it as *prima facie* evidence is removed by showing that it was certified without personal knowledge of the facts set forth. The certificate of a notary public to the fact that demand of payment and protest for nonpayment of negotiable paper was made is *prima facie* evidence of that fact. (Comp. Stats., sec. 1576, p. 1077; *Smith v. McManus*, 7 Yerg. 477; 27 Am. Dec. 522; *Browne v. Philadelphia Bank*, 6 Serg. & R. 487; 9 Am. Dec. 463.) But when it appeared that the notary certifying such alleged demand and protest did not so certify from his own knowledge, the certificate thereby lost its force

as *prima facie* evidence to support the fact that such presentation and demand was made. (*Hoff v. Baldwin*, 12 Mart. (La.) 699; 13 Am. Dec. 385; *Williamson v. Turner*, 2 Bay, 410; 1 Am. Dec. 652.) The court, observing of the notary's action in the latter case, that "his own knowledge of the fact will alone justify him in making up his protest, either to send abroad into foreign countries, or in inland transactions." It will not suffice to answer that the notary must personally make the demand, because such is not the law; the demand may be made by another in the presence of a notary. This is affirmed in the cases cited above, as well as numerous other cases. In those cases to impeach the certificate the notary who certified was called, and from his testimony it was ascertained that he certified without knowledge of the facts set down in the certificate, and such showing condemned the certificate as worthless to evidence the facts certified.

But how is the holding in the case at bar? By the opinion of the majority of this court the certificate is proclaimed as *prima facie* evidence of the nomination of respondent, and held as good enough to warrant judgment for respondent, although the one whom the law appoints and intrusts with the solemn duty of making a public record by certifying the nomination as secretary of the committee, is compelled under oath to acknowledge that he was not present at any meeting of said committee at which respondent was nominated as certified, nor could he state the time, place, or circumstances of any such nomination by the committee.

This brings me to the point where a reference to the evidence ought to be made, and must be made principally by quotation, wherever my view differs from a majority of the court as to what the evidence shows; for it is not my purpose, by contra-assertion, or negation, to dispute those conclusions set down in the opinion of the court, as to what the evidence shows, and on the strength of which the court proceeds to affirm that the evidence "tends to prove that the committee nominated respondent," as represented in said certificate. But let the witnesses be introduced to contradict those affirmations and conclusions by quotation of all they say as to their knowledge of the committee's action.

There is no dispute that a convention of the People's party was held at Great Falls, in and for said Cascade county, which comprises the judicial district in question; that nominations were made by said convention, but not of any candidate for district judge; that as shown by the minutes of said convention introduced in evidence, the convention appointed a "county or executive committee," consisting of Jeff Campbell, D. McKay, Harry Dickerson, S. Porter, Frank Marion of Great Falls; Harry McLaughlin, and John Gillem of Sandcoulee; that said "county or executive committee" was empowered to add members "from other precincts"; that Mr. George L. Wales was secretary of said convention, but was not appointed as a member of said committee; that said George L. Wales signed and certified the certificate which was filed in the office of the county clerk, representing that respondent had been nominated for the office of district judge, by said committee, as the nominee of the People's party.

Mr. Wales was called to the witness stand by relator, and having introduced the minutes of said convention, his testimony concerning the alleged nomination of respondent by said committee, in answer to questions forms the following dialogue:

Q. Were you present at any meeting of the committee at which Judge Benton received the nomination? A. Yes, sir.
Q. Where was that meeting held? A. At several places.
Q. State the places. A. Sometimes one place, and sometimes another. The first was in the convention. Q. That was not the committee meeting; confine yourself to this meeting of the alleged executive committee that professes to have nominated Judge Benton? A. We met sometimes in McKay's office. Q. Who met at McKay's office, and when? A. I did not keep the dates; we met too often. We met at McKay's office as an executive committee. Mr. McKay, Campbell, Porter, and sometimes Holmes, were present; at other times different members. Q. I would like to know something about this particular time? A. I can't say. Q. Were you ever present at any meeting of the executive committee at which a vote was taken or resolution adopted providing for the nomination of Judge Benton; and I will ask you next where it was, if there was such a meeting? A. No, sir.

Q. Then it is a fact, or is it a fact, then, that the information which you had which led you to sign this certificate of nomination concerning any action taken by the executive committee was conveyed to you by hearsay; that is, by some person who professed to be present? A. By the members of the committee. Q. Which members? A. McKay, Porter, and Campbell. [Witness continuing.] I signed that document—this certificate—at the courthouse, here in Judge Benton's office. McKay, myself, Holmes, and Judge Benton were present at the time. I can't say who prepared the document for execution. It was not prepared by Judge Benton in my presence. I believe that this meeting took place in Judge Benton's office, when this paper was signed, on the seventeenth day of October, which was the last day that the certificate could have been filed. I know that a certificate of nomination is required to be filed by law twenty days before an election, and this was the last day, as I figured it, upon which a certificate might be filed. Myself, Holmes, and McKay were present when it was signed, and we came to be present at the meeting. Knowing that the nomination had not been put in, Mr. Holmes sent for me, and told me that the time was up, and we would have to put it in. Q. You came up there because Mr. Holmes called you? A. I expected to be called upon whenever the document was ready. I was notified by Mr. Holmes to come down with McKay. McKay came to the store after me. He dropped into the store and told me to come up sometime.

Cross-Examination by Defendant.

Q. You speak of the original committee, I believe, in reply to Mr. Shores—the executive committee. Was any one added to that committee after the convention, and if so, who was it? Relator objects to the question as incompetent; no authority was given by the convention to make any change in its committees. A. Mr. Holmes, who lives here in Great Falls. Q. Then I will ask you if Mr. Holmes was a member of that committee at the time of nomination of Judge Benton? A. He served as such. It is rather a difficult question for me to answer whether I had any notice to be at that meeting which nominated Judge Benton, because we had so many meetings. I know of several meetings where Judge Benton's name came

forward. Q. Was he nominated more than once? A. It was decided on several times. Q. You may state whether you were present at a meeting where it was decided that he should be the nominee of the People's party? A. Yes, sir. Q. Who else was present? A. Mr. McKay, Porter, and Campbell. There may have been others around. I know we were there; I concurred in this nomination and signed the certificate.

Redirect Examination.

It was reported to me that Holmes was added to the executive committee. I was not present at any meeting where he was appointed, or when anybody appointed him or added him. I do not know who had got added except as somebody told me who had been added to the executive committee. I was informed of it, and he served as such; that is all I know about it. I do not know who appointed him. I do not know whether McKay appointed him. There was a meeting one time at which McKay, Holmes, and myself were present at Dan McKay's office. I happened to go there because we had a regular—not a regular meeting, but an irregular meeting. I did not happen to be there. We went there for a purpose. We were notified by Mr. McKay. He met me on the street, and said, 'Come over to my office; meeting to-night.' That is all he said, and I understood it, and where the meeting was to be held, but I did not know what it was for. I went down to McKay's office at that time.

Q. How long was that before the certificate of nomination was made? A. From September 27th down to election day. Q. You were all that time? A. No, sir. Q. I am asking you how long this meeting was held prior to the time of making this certificate of nomination? A. I cannot tell, there were so many meetings. Q. There is one particular meeting about which you have testified when you and three others were there; when was that held? A. I can't say, no minutes were kept. This was before the certificate was filed; may be two or three weeks, or it might have been a month before. Q. Do you mean to say that you have no recollection upon the subject? A. No date; I can't tell the date; we kept no minutes of our meetings; the other business that we did was, we discussed finance. Q. Who at that meeting, if anybody, proposed that Judge Ben-

ton be nominated for this office? A. I think the whole of them present spoke of it. Q. Was it at that meeting determined to nominate him? A. I can't say whether it was at that meeting fully determined. Q. Do you mean to say that at that meeting the subject was discussed, and favorably discussed? A. It was always favorably discussed. Q. Let us have a definite answer, if you can give it, to the question whether at that time and meeting held in Dan McKay's office, whether or not it was definitely decided to put Judge Benton in nomination? A. I can't answer that question. Q. Will you please refer to any other meeting at which the propriety or advisability of nominating Judge Benton was under consideration? A. I can't name any individual meeting. Q. I take it that you are unable to point out any particular meeting at which it was determined to nominate Judge Benton? A. Yes, sir. Q. That you had, in that and in various conferences over the matter, favorable discussion; that is about the substance of it? A. Yes, sir. Q. And on the day that this certificate was executed you were requested by Daniel McKay to come over to the courthouse, and did so, and affixed your signature to the certificate? A. Yes, sir. I came to the courthouse. This is about all that I know about the nomination of Judge Benton. After his appointment Holmes acted with the committee. I was present at several meetings where Mr. Holmes was."

This witness was called to impeach the integrity of said certificate of nomination, by showing that it was certified by him without knowledge as to whether its contents expressed truth or fiction; and as usual with an unwilling witness, or one desirous of making out exactly the opposite of that which he is called to prove, he starts out with an answer affirming that he was "present at a meeting of the committee which nominated Judge Benton"; and then with great circumlocution and evasion he shifts around the simple inquiry as to when and where said committee assembled, and who were present, and other pertinent inquiries; until finally he is compelled, in fidelity to his oath, to state that he was never present at any meeting of the executive committee "at which a vote was taken or a resolution adopted providing for the nomination of Judge Benton"; and again that, "it is a fact that the informa-

tion which led him to sign said certificate was the assertion of "other members of the committee," and when asked to name them could name only three; that he was called to the courthouse, and in Judge Benton's office, on the last day for filing such a certificate, in company with only one member of said committee, together with Judge Benton, and Holmes, who at the most only assumed to act as a member of the committee, and without eligibility, as known to the witness, because the committee was authorized to add members from other precincts only, and Holmes, according to the testimony of this witness, was a resident of Great Falls, and with no knowledge of any other nomination of Judge Benton by said committee, this witness signed said certificate as secretary of the committee. Even under examination by respondent, this "secretary" of said committee, having said that he was present at a meeting of the committee "where it was decided he (Judge Benton) should be nominated" yet was unable to locate such meeting of the committee. And, again, under relator's redirect examination, this witness shifts about the one simple question with many more evasive answers, and finally closes his testimony by repeated denials of any knowledge of such a nomination by said committee, in this wise: when asked "let us have a definite answer, if you can give it, to the question whether or not at that time and meeting held in Dan McKay's office, it was finally decided to put Judge Benton in nomination?" he replied, "I cannot answer that question." And, again, in answer to the question. "Will you please refer to any other meeting at which the propriety or advisability of nominating Judge Benton was under consideration?" he said, "I cannot name any individual meeting." And, again, to the interrogator's observation, "I take it that you are unable to point out any particular meeting at which it was determined to nominate Judge Benton?" he replied, "Yes, sir." And, again, to the question, "And on the day this certificate was executed you were requested by Dan McKay to come over to the courthouse, and did so, and affixed your signature to the certificate?" he answered, "Yes, sir, I came to the courthouse. This is about all that I know about the nomination of Judge Benton." Such are the flimsy and spurious pretenses upon which

said certificate is based, and such is the direct impeachment of its integrity as *prima facie* evidence of the facts it was made to record. Nevertheless, the majority of this court, in the light of such showing, are pleased to approve said certificate as good enough still, and to hold that such evidence "tends to prove that said committee did nominate respondent."

How does it support such views, to say that if Wales knew nothing about any such action of the committee, there was still another who signed said certificate as chairman of said committee, and that he was not called also to impeach the certificate? Surely the court would be consistent in its holding, and lay no harder rule on the chairman than on the secretary, whom the law had commissioned to certify to the action of the committee; and thus, if the chairman had been called, and exhibited the same determination to make out that the committee did make such nomination, and yet was forced repeatedly to admit that in fact he knew nothing of any such action, the majority of this court, having held such want of information good enough on the part of the secretary, and that his certificate was still *prima facie* evidence, although he testified that he knew nothing about the facts certified, would also hold the same in respect to the chairman, yea, that such evidence "tends to show that the committee made such nomination."

It appears that respondent himself lent a little assistance in reference to his alleged nomination in question here. He was called to the witness-stand by relator, and his testimony is somewhat significant. He admits that he personally prepared said certificate representing his nomination by said committee. And also that he made the correction appearing in said certificate by interlineation. And further said: "I was not present at any other meeting of the executive committee prior to the time of the execution of the certificate of nomination, and have no knowledge of any previous meeting having been held. I had spoken I think with one or two members of the executive committee, or they had spoken to me, with reference to indorsing my nomination by the Republican party; I think Mr. McKay, and Mr. Campbell, I think, was the other."

This statement of respondent that he had "no knowledge of any previous meeting having been held," implies that he con-

sidered or pretended to consider the meeting at his office when said certificate was executed, a meeting of the committee, although only one member of the committee was present, with himself, Wales and Holmes, on that occasion. But those were there who had been called to respondent's office to sign said certificate, when the last hour for filing it was very near at hand. This coincides with Wales' testimony. They had to consider that a meeting of the committee, if they pretended that any meeting of the committee sanctioned the nomination certified, because they could not point to any other meeting whatever at which respondent was nominated.

This testimony of respondent shows too that he undertook the preparation of the document certifying his nomination, in advance of any knowledge that the committee had invited such action from him, or any one else, by conferring such nomination upon him. But without any such knowledge, according to his own testimony, he prepared the certificate, and the parties who signed it were summoned to his office on the last day for filing it, and under his tuition, he having corrected the certificate to conform to his idea of sufficiency, it was signed and filed.

Now no one pretends, in view of the real facts exposed on the hearing of this case, that said alleged meeting at Judge Benton's office was a committee meeting in any sense whatever. Therefore, if any such nomination was in fact made by the committee at all, it must have been at some meeting of the committee previous to the signing of the certificate; of which meeting even, much less nomination, neither respondent, nor Mr. Wales, "secretary," had knowledge; although the secretary testifies that he was there in Great Falls "all the fall," where a majority of the committee resided, and where it is pretended such meeting was held. Under these circumstances, should the secretary of a committee who is to certify its action for public record know of the meeting of the committee? Apparently not, according to the decision of this court. But consider the evidence a little further: Is it not a very singular and striking circumstance that respondent, who sought the nomination with such eagerness as to prepare his certificate of nomination, was, up to that late hour, entirely without knowl-

edge of an event of such usual and desirable notoriety as a political nomination for an elective office, through the action of a committee, if any such action had ever been taken at all. Is it not remarkable that the "tendency of the evidence" was not strong enough to bring such knowledge to one who sought the nomination with such anxious personal solicitude?—one living right where a majority of the committee resided, and where, as it is pretended, the meeting took place—and one sustaining such intimate personal relations with the principal actors in the transaction, as to have their meeting at his office, and to prepare for them the important document? Not only respondent was ignorant of any such action of the committee, but Mr. Wales, "secretary," so full of pretended knowledge of such meeting and nomination prior to the execution of said certificate, is compelled, repeatedly, to admit that he in fact had no knowledge that what he certified was true. The circumstances connected with the consummation of a transaction, or the execution of an instrument, are pertinent to be shown in evidence and considered (Code Civ. Proc., § 632), and always where the genuineness and integrity of the instrument is under inquiry. Confronted by such circumstances, no wonder respondent besought the court for the relief of nonsuit, to escape the embarrassment of attempting to produce proof showing that the pretended meeting and nomination by the committee actually occurred. The certificate of nomination had been clearly impeached, both in law and in fact. And, therefore, in my humble opinion, when the certificate upon which respondent hung his case as being *prima facie* evidence of his nomination, had thus been impeached, and lost all weight as evidence of the fact which it certified, nonsuit was clearly improper without considering further circumstances. But over and above that situation the strong tendency of the proof, and the circumstances proved, was to the effect that no such committee meeting or nomination as was certified ever occurred at all. All authority agrees that we must regard as proved what the evidence offered tends to prove, on considering the propriety of granting a motion for nonsuit. According to what has been shown, respondent was in a trying situation when he moved for nonsuit. If it had been denied, as

it should have been, because of the impeachment of the certificate, and the tendency of the evidence as showing that no such meeting or nomination ever occurred, respondent would have been compelled to abandon the case, or find proof to show the palpably improbable fact that a committee of a political party, alleged to have nominated him, held a secret meeting for such nomination, and guarded the secrecy of that event so carefully and successfully that not only respondent, but even the secretary of the committee, did not know of the meeting up to the time of filing said certificate on the last day fixed by law for filing the same. Where would respondent find evidence to prove such unnatural and improbable events? In the face of these exposures, which no doubt convinced respondent and his counsel that the committee had never adopted any such procedure, and consequently no such action could be proved, a motion for nonsuit was made. Under those circumstances respondent must have needed the relief of nonsuit to allow his escape from the contest. But in my opinion neither the law nor the facts warrant such decision.

STATE EX REL. SIMARD v. FOURTH JUDICIAL
DISTRICT COURT.

[Argued August 21, 1893. Decided September 5, 1893.]

18 347
126 887

CONTEMPT—*Certiorari*.—Proceedings to punish for contempt in violating an injunction are reviewable by this court on *certiorari*. (*In re McOutcheon*, 10 Mont. 115; *In re Shannon*, 11 Mont. 67; *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451, cited.)

SAME—Violation of injunction.—One who has been enjoined from cutting hay upon certain land and who, after the service of the injunction, advises and procures others to proceed with the cutting and removal of the hay is punishable for contempt.

Original proceeding. Application for writ of *certiorari* to review action of district court in punishing relator for contempt. Writ denied.

Statement of the case by the justice delivering the opinion:
This is an application for a writ of *certiorari* to review the action of the fourth judicial district court in fining relator for

an alleged contempt of court. Relator was attached for contempt, and a hearing was had, at which evidence was introduced. In the return to the writ of *certiorari* from this court, the papers, proceedings, and evidence which were before the district court, and upon which relator was adjudged to be guilty of contempt, are certified to this court, and from them the following statement of facts may be made:

J. O. Hanratty and A. R. Tillman commenced an action in the fourth judicial district court against Eugene Simard to obtain a judgment against him, restraining him from cutting hay on certain land, alleged in the complaint to belong to Hanratty and Tillman. A writ of injunction was issued July 28, 1893, from the district court, and served on Simard the same day. On July 31st Hanratty made affidavit before the court that the injunction had been violated by the aid of the servants and employees of Simard, in that they had gone upon the land, and removed all the hay. An attachment for contempt was issued against said Simard and Asselin. The hearing was set for August 3, 1893. On the hearing the pleadings in the case of *Hanratty v. Simard* were before the court, and also testimony was taken of witnesses. The testimony of Simard, Asselin, La Casse, and Hauratty, which the court below had before it on the hearing being reduced to a short narrative, is as follows: The land was claimed by Hauratty and Tillman through purchase from the Northern Pacific Railroad Company, made May 31, 1893. This was known to Simard and to Asselin and La Casse. Six years previous Simard had sown grass seed upon the land, and had fenced it and cut the hay. Other than these acts, he made no claim of any rights to the hay or the land. In June Simard made a contract with Hanratty and Tillman that he would cut the grass for them for five dollars a ton. Afterwards, and on July 10, 1893, he sold the grass as his own, as he says, to Asselin and La Casse. After that, on July 24th, he told Hanratty that he had concluded to cut the grass for himself. Asselin and La Casse employed Simard to cut the grass, which he was doing on July 28, 1893, at which time the injunction was served upon him. Asselin was never on the land but once since the 10th of July, until he began to cut the hay,

as hereinafter described. A few moments after the injunction order was served upon Simard, he told Hanratty that the grass belonged to him, Simard, and that he was going to have it, and that he, Hanratty, could not hurt him for taking it. He then went at once to Frenchtown, and told Asselin of the service of the injunction, and he and Asselin went to Missoula to consult lawyers regarding the moving of the hay. On their way to Missoula nothing was said by either of them regarding the hay or the moving of it. Returning from Miseoula, Simard told Asselin that he thought from what their lawyers said, he, Asselin, had better go ahead and cut said hay. Simard himself took no part in the moving of the hay, but the same was all taken from the ground by Asselin on the 30th of July. Hanratty had a talk with Simard regarding his purchase of the land from the railroad company, and Simard never in any way made any objection to Hanratty's ownership of the land prior to about the 24th of July, when he claimed the grass growing thereon as his own.

Upon the facts appearing as above recited, the district court discharged Asselin from the charge of contempt, and held Simard guilty, and fined him one hundred dollars and costs. Simard contends that this action of the district court was without jurisdiction, and should be annulled by this court upon *certiorari*.

Bickford, Stiff & Hershey, for Relator.

Marshall, Francis & Corbett, for Respondent.

DE WITT, J.—The respondent contends that this contempt proceeding is not reviewable in this court on *certiorari*, but that contention seems to be disposed of by the following cases: *In re McCutcheon*, 10 Mont. 115; *In re Shannon*, 11 Mont. 67; *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451. We proceed to the merits of the application.

The statement of case above recites what the testimony before the court tended to prove, and, indeed, is conceded by the relator to be correct, except in one particular, which is not of great importance. We therefore review the situation, as recited, as that which was before the district court. Simard

personally and physically desisted from interference with the hay after service upon him of the writ of injunction, but did he not obtain to be done that which he did not personally do? The district court proceeded upon the ground that he did. The injunction was against Simard, his agents, servants, and employees, and all others acting in aid or assistance of him. It appears that the relation of Simard to Asselin and La Casse was very close. Simard knew that Hanratty and Tillman claimed title to the ground by purchase from the railroad company. He recognized that claim when he contracted to cut the hay for them. After agreeing to cut the hay for them he purported to sell the grass to Asselin and La Casse, and agreed to cut it for them. Then afterwards, at the service of the writ, he said that it was his own, and he was going to have it. If his position was only that of a servant of Asselin and La Casse, he contradicted his claim to that relation when, at the time of the service of the writ, he claimed the hay himself. If he were only a servant, he had no interest in the hay or its disposition after he had informed his alleged master of the service of the writ. But we find him going to Missoula with Asselin to consult lawyers, whom he describes as "our lawyers." He says to Asselin: "From what our lawyers say, you had better go ahead and cut the hay." So we find Simard recognizing the Hanratty and Tillman title on one day, and agreeing to cut the hay for them. Very soon afterwards he is selling the hay to Asselin and La Casse, and agreeing to cut it for them. Next we find him claiming the hay himself. Then, in company with Asselin, he is consulting "their lawyers," and he suggests to Asselin that he, Asselin, had better go ahead and cut the hay.

We are of opinion that the district court exercised a sound discretion if it concluded that Simard, under the showing made, had a very lively personal interest in the hay. All the circumstances together indicate this. Although the claim is made that Simard was only the servant of Asselin and La Casse, yet we believe that the district court was justified in its conclusion that Simard disobeyed the injunction by advising or procuring Asselin and La Casse to do the prohibited act. It is said by the New York court of appeals "that injunction

orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; that they might be violated by aiding, countenancing, abetting others in violation thereof, as well as doing it directly; and that courts would not look with indulgence upon schemes, however skillfully devised, designed to thwart its orders." (*People v. Pendleton*, 64 N. Y. 622.)

We are therefore of opinion that the writ of *certiorari* should be denied, and it is so ordered.

HARWOOD, J., concurs.

PEMBERTON, C. J., did not sit in the hearing of this case.

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15	911
34*	94
38*	1070

**BUTTE HARDWARE COMPANY, RESPONDENT, v.
COBBAN, APPELLANT.**

[Argued October 10, 1892. Decided September 11, 1893.]

QUIET TITLE—Tenants in common—Adverse claim.—Failure to file an adverse claim to an application for patent to a mining claim does not estop a tenant in common from maintaining an action to quiet title to an interest in such claim against his cotenants, who had obtained the patent, and their grantees, where it was not pleaded or shown that plaintiff was an owner or claimant when application for patent was made, or that his grantors had an interest upon which they failed to adverse.

TRUSTS—*EstoppeI*.—Where the patentees of a mining claim do not controvert the existence of a trust in favor of a third person as to an undivided interest in such claim, their grantees who obtained quitclaim deeds for a grossly inadequate consideration, and with notice that his grantors claimed no title to such interest, is not an innocent purchaser for value, and therefore not entitled to an estoppel of the equitable owner of such interest, and the patentees will be decreed to convey to their *cestui que trust*.

QUIET TITLE—Trial—Findings by the court.—In an action to quiet title and remove a cloud upon an undivided interest in a mining claim, a finding that defendant had built a foundation for a house which was partly upon a portion of said premises is not a finding that he was in possession of plaintiff's undivided interest in the claim, or that plaintiff was not in such possession.

CORPORATIONS—*EstoppeI*.—A party claiming title to a mine through a commercial corporation is estopped to question the right of such corporation to take and hold title to mining property. (*First National Bank v. Roberts*, 9 Mont. 331, cited.)

Appeal from Second Judicial District, Silver Bow County.

Action to quiet title. Judgment was rendered for the plaintiff below by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion : This action is to quiet title as to the two thirty-seCONDS undivided interest in the Yellow Jack mining claim. The defendants Schwab, Cummings, Hauser, and Fitchen were owners of the claim, and made application for patent therefor. The Butte Hardware Company, the plaintiff, bought one-eighth interest in the claim from Schwab May 5, 1884. December 27, 1884, a deed was made, purporting to be by the Butte Hardware Company, to Schwab, Cummings, Hauser, and Fitchen, for said one-eighth interest. The execution clause of that deed reads as follows: "In witness whereof the said party of the first part doth hereunto set its hand and seal the day and year first above written. [Signed] Butte Hardware Co. By P. A. Largey, Supt. Signed, sealed, and delivered in the presence of Jos. H. Harper." On December 30, 1884, the receiver's receipt was issued from the land office to Schwab, Cummings, Hauser, and Fitchen. On October 18, 1889, Schwab executed and delivered to defendant Cobban a quitclaim deed of all his interest in the premises. On October 26, 1889, defendant Cummings executed and delivered a similar deed to defendant Cobban. The plaintiff contends that these deeds to Cobban are void, and a cloud upon its title. The complaint alleges that on December 27, 1884, the plaintiff was, and for a long time had been, the owner of, and in the possession and entitled to the possession of, said undivided one-eighth interest in the Yellow Jack mining claim, describing the claim; that on said day Schwab, Cummings, Hauser, and Fitchen were also owners, and, for the purpose of conveniently obtaining patent for the premises, agreed with P. A. Largey, superintendent of the plaintiff, that if plaintiff would convey its interest to them they would hold it in trust, and on demand reconvey to plaintiff; that P. A. Largey executed to those defendants the deed above mentioned; that this deed was executed and delivered without any consideration whatever, with the intention between Largey and those defendants that they should hold said property as trustees for the Butte Hardware Company; that Largey had no authority to sell or convey said property to defendants, or any one, and that said deed was executed without authority; that the property was worth ten thousand dollars; that plain-

tiff is now in possession. The complaint further alleges that on the eighteenth and twenty-sixth days, respectively, of October, 1889, the defendant procured said Schwab and Cummings to execute to him deeds for all their interest in the claim. It is alleged that Cobban did this with full knowledge of the alleged trust pleaded above, and with full knowledge that said Schwab and Cummings had no ownership or title in or to the said one-eighth interest. Said deeds are recorded in the county of Silver Bow, and are a cloud upon plaintiff's title. The complaint prays that Schwab, Cummings, Hauser, and Fitchen be decreed to be the trustees of plaintiff as to said one-eighth interest, and be required to reconvey the same to it, and that said Cobban be decreed to have no title in said one-eighth interest.

Schwab, Cummings, Hauser, and Fitchen defaulted. Cobban alone answered. The answer of Cobban denies the material averments of the complaint specifically. It further sets up that plaintiff is a commercial corporation organized under the laws of Montana for the purpose of engaging in mercantile business, and cannot hold or acquire the real estate or mining claim described in the complaint; that the holding of said ground is not necessary in the business of plaintiff. The answer alleges that said defendant Cobban purchased the Schwab and Cummings alleged interest in good faith, and for a valuable consideration.

The case was tried by the court without a jury. The court found that Largey, assuming to act as superintendent of plaintiff, made the deed above described; that the same was duly recorded in Silver Bow county on December 27, 1884; that there was no declaration of trust, or instrument in writing, showing that the two thirty-seconds interest so conveyed to Schwab and Cummings was to be reconveyed to plaintiff. It was also found that the receiver's receipt was issued to said Schwab and Cummings for said two thirty-seconds interest, and that they have never conveyed that interest to any one except Cobban. It was found that Cobban, at the time the action was commenced, had built a foundation for a house, which was partly upon the Yellow Jack claim. The court found that the plaintiff corporation was entitled to purchase and hold the one-

eighth interest in said mining claim. The judgment decreed that the deed made in the name of Largey, superintendent of plaintiff, to defendants Schwab, Cummings, Hauser, and Fitchen, is null and void, and that it conveyed no title; also, that the deed made by Schwab to Cobban, and the deed made by Cummings to Cobban are absolutely void against plaintiff; that plaintiff is the lawful owner of the property described in the complaint; and that its title thereto is adjudged to be quieted against all claims of the defendants, or either of them. The decree further recites that, it appearing that said void deed made by Largey was used in the land office as part of a chain of title, and that by the use of that deed the land office had issued a receiver's receipt for the property described in that deed to Schwab, Cummings, Hauser, and Fitchen, and that that property belongs to the plaintiff, it is ordered that said four defendants execute and deliver a deed conveying to plaintiff the title to the property described in its complaint, which they acquired by virtue of the receiver's receipt. From this judgment the defendant Cobban appeals. The other facts are stated in the opinion below.

Charles R. Leonard, and Toole & Wallace, for Appellant.

I. Respondent not only waived its legal title by not interposing its adverse claim, but also its equitable title, if it had any capable of being enforced against the applicants for the patent. (*Meyendorf v. Frohner*, 3 Mont. 282; *Black v. Elkhorn Min. Co.*, 49 Fed. Rep. 549.) The patent unquestionably passed the legal title to appellant's grantors. (Rev. Stats. U. S., 2325, 2326. See, also, authorities cited in 15 Am. & Eng. Ency. of Law, 573, tit. "Adverse Claim"; *Hall v. Equator Min. Co.*, Morrison's Digest of Mining Decisions, 3d ed., 282-86; *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Saw. 302; *The 420 Mining Co. v. Bullion Mfg. Co.*, 3 Saw. 659; *Golden Fleece etc. Co. v. Cable etc. Co.*, 12 Nev. 320; *Gwillim v. Donnellan*, 115 U. S. 45; *Lee v. Baleom*, 9 Col. 216; *Talbot v. King*, 6 Mont. 76; *Raunheim v. Dahl*, 6 Mont. 167.)

II. The court found that defendant Cobban was in the possession of a portion, at least, of the premises in controversy.

The action brought was to quiet title and remove a cloud. In such actions the plaintiff must prove possession of the premises in controversy, failing in which he will be nonsuited. The rule is too well established to need any further citation of authorities than *Wolverton v. Nichols*, 5 Mont. 89; *Milligan v. Savery*, 6 Mont. 129.

III. A mercantile corporation cannot sit by, allow others to obtain a patent for mining property claimed by it, and after their conveyance to a third party assert the title it held before the issuance of the patent. After the expiration of the notice presumed to have been given by the certificate of the land office, it waived all objection to the issuance of a patent, and consequently stands precisely in the same situation it would be in had the patent issued.

F. T. McBride, and George Haldorn, for Respondent.

I. It appears from the record and is admitted that the void deed had been used in the United States Land Office upon application for patent for the ground in controversy as part of the applicant's chain of title, and that, relying upon said void deed, the receiver's receipt had issued to the grantees named in the void deed as owners of the ground in controversy. The said grantees named in the said void deed thereby became involuntary trustees of the respondent as to the title so acquired by them, and the record shows that a resulting trust was alleged and proved. (*Lakin v. Sierra Buttes Gold Mining Co.*, 25 Fed. Rep. 341; *Wilson v. Castro*, 31 Cal. 420; *Salmon v. Symonds*, 30 Cal. 301; *Bludworth v. Lake*, 33 Cal. 265; *Hardy v. Harbin*, 4 Saw. 549; *Suessenbach v. First Nat. Bank*, 5 Dak. 477; *Hunt v. Patchin*, 35 Fed. Rep. 816; *Widdicombe v. Childers*, 124 U. S. 400; *Felix v. Patrick*, 145 U. S. 317.)

II. Respondent did not purchase its interest in the lode claim until the year following the application for patent, and therefore could not have adverced as contended by appellant.

III. The plaintiff was in the actual possession of the ground in controversy at the date of the commencement of the suit. It is further submitted that an action to remove a cloud from title may be maintained by a party out of possession. (3 Pomeroy's Equity Jurisprudence, p. 435, sec. 1399, n. 4, and cases cited.)

IV. The act of the corporation in making the purchase can be inquired into by no one but the state. (Code, 725, sec. 447; *National W. & M. Co. v. Clarkin*, 14 Cal. 543; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, 430; *First Nat. Bank v. Roberts*, 9 Mont. 323-31.)

DE WITT, J.—It is pleaded, it is adjudged by the court, it is not specified as error, and it is relied upon in argument on both sides, that the deed made by Largey, purporting to be the deed of the Butte Hardware Company, was and is void. We will therefore start with the foundation that the deed was a nullity. When that pretended deed was made, the Butte Hardware Company owned a one-eighth interest in the Yellow Jack mining claim. The deed, being to Schwab, Cummings, Hauser, and Fitchen, without describing the shares which the grantees were supposed to take, therefore purported to give Schwab and Cummings two thirty-seconds of the Yellow Jack mining claim. The deed being a nullity, Schwab and Cummings took nothing thereby. If that be true, Schwab and Cummings conveyed nothing to Cobban in October, 1889. This is clear enough, unless there is some estoppel.

It is contended that the Butte Hardware Company is estopped because it did not file in the United States Land Office an adverse claim (Rev. Stats. U. S., § 2326) to the application for patent. But it does not appear that at the time of application for patent the Butte Hardware Company had or claimed any interest in the Yellow Jack mining claim, or that its grantors had an interest upon which they failed to file an adverse claim. The pretended deed from the Butte Hardware Company to Schwab et al. was made December 27, 1884. The Butte Hardware Company acquired its title to the one-eighth interest in May, 1884. If the notice of application for patent had been admitted, it would have appeared that the Butte Hardware Company did not own an interest in the claim when advertisement occurred. But, it not being allowed in evidence, it nowhere appeared, nor, indeed, was it pleaded, that the Butte Hardware Company, at the time of advertisement for patent, was an owner or claimant in the premises, or could thereby be estopped by virtue of not filing an adverse claim to the application for patent.

Again, is the Butte Hardware Company estopped from claiming its title in two thirty-seconds of the Yellow Jack mining claim by virtue of Cobban buying the two thirty-seconds interest from Schwab and Cummings, grantees in the pretended deed of Butte Hardware Company to Schwab, Cummings, Hauser, and Fitchen, of December 27, 1884? Added to the fact that that was a void deed, absolutely, we are of opinion that Cobban was not an innocent purchaser for value. It sufficiently appeared that, before Cobban bought from Schwab and Cummings, he was informed that if Schwab and Cummings had an apparent title to the two thirty-seconds interest on record, they had none in fact. Fitchen testified to this effect, although he was disputed by Cobban. Schwab and Cummings each deposed that he told Cobban that he had no claim to this two thirty-seconds interest. Cobban, however, said he would take a deed. He obtained quitclaim deeds from Schwab and Cummings. He paid five dollars for each—a grossly inadequate consideration, under the evidence. Cummings deposed that Cobban promised to give him more if he got any thing out of the claim. Under all these facts, it is apparent that Cobban was not an innocent purchaser for value, and that he had the amplest facts to put him on inquiry. Therefore, we arrive at this situation: By the receiver's receipt, December 30, 1884, whatever right passed from the United States (and we will call it a title for the purpose of this decision) passed to Schwab, Cummings, Hauser, and Fitchen. But at that time the Butte Hardware Company owned one-eighth of the possessory title, as against Schwab, Cummings, Hauser, and Fitchen, and still owns it. These four persons concede this. Cobban disputes it. But his grantors are Schwab and Cummings. They concede it, and Cobban is in no position superior to them, because he is not an innocent purchaser for value. Therefore, every one—Schwab, Cummings, Hauser, and Fitchen, in fact, and Cobban, in effect—concedes that the first four persons named hold in their names the receiver's receipt for the Butte Hardware Company's one-eighth interest of the Yellow Jack Mining claim. Under those circumstances, why should they not convey it? It is not a question of proving a trust, by parol or otherwise. The simple situation is:

Four persons have in their names title to real estate which belongs to another. They admit that fact, and Cobban is not a person to controvert it. It is our opinion that they are trustees, and should be, as they were, decreed to convey to their *cestui que trust*. There seems to be no occasion for the creating or declaring of a trust, or offering evidence that it was created or declared, or relying upon the deed from the Butte Hardware Company to Schwab, Cummings, Hauser, and Fitchen. The existence of the trust is uncontested.

The action is to quiet title and remove a cloud. Appellant claims that plaintiff was not in the possession of the premises, the two thirty-seconds undivided interest in the mining claim at the commencement of the action. (Code Civ. Proc., § 366.) His specification in this regard on motion for a new trial is as follows: "The evidence is insufficient to sustain the decision and the decree of the court, for the reason that the evidence establishes the fact that the defendant George A. Cobban was in possession of a portion, at least, of the premises in controversy at the time of the institution of said action, as was found by the court in its special finding No. 8." Finding 8 is as follows: "Did said defendant Cobban, in pursuance of his purchase of said two thirty-seconds of said mining claim, enter upon a certain portion thereof, and construct and erect a house thereon? And was such house so upon said premises covered by it at the time that this action was commenced? Answer. He had built a foundation for a house, which foundation was partly upon a portion of said premises." Appellant contends that this is a finding that respondent was not in possession of the premises, the subject of the action. The subject of the action was two thirty-seconds undivided interest in a mining claim. That defendant had put a foundation for a house partly upon the mining claim, we think, is not a finding that defendant was in possession of plaintiff's claimed two thirty-seconds undivided interest in the premises, or, in effect, that plaintiff was not in such possession.

It is contended that plaintiff, as a commercial corporation, is not empowered to hold or claim an interest in a mining claim. It appeared that plaintiff was occupying a portion of the surface of the claim with a warehouse which it was using

in its business. The defendant Cobban is not an appropriate person to raise that question. What Cobban claims as to title comes from plaintiff. If Cobban could be said to own anything (which, as we have seen, cannot be said) he owned it from plaintiff as grantor behind Schwab and Cummings. (*First Nat. Bank v. Roberts*, 9 Mont. 331.) The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., having been counsel in this case, does not participate in the decision.

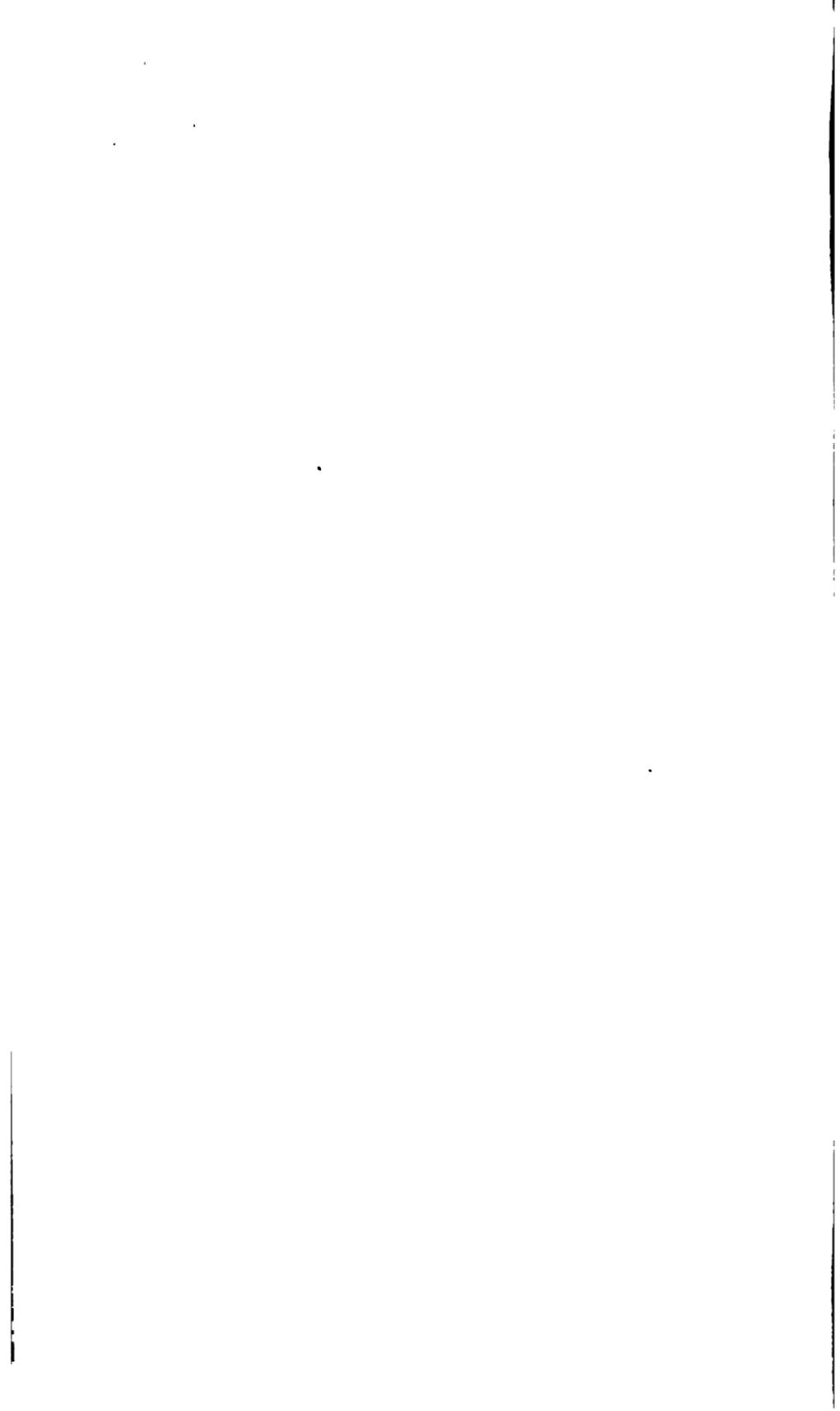
HARWOOD, J., concurring.—My concurrence in affirming the judgment of the trial court proceeds upon the ground that the facts shown give rise to a trust in the grantees of the patent in favor of the plaintiff for the eighth interest which it owned in said property when patent was issued therefor, and that appellant, Cobban, acquired his alleged claim thereto with knowledge of the equities existing in favor of plaintiff. For the purpose of this review the receiver's final receipt has been regarded by both parties as equivalent to a patent, and therefore the case is considered as if patent had issued. It is not disputed that after patent was applied for and notice had run, plaintiff came into ownership of an eighth interest in said lode claim, nor that the Largey deed, purporting to convey plaintiff's interest to Schwab, Cummings, Hauser, and Fitchen was void. But through the appearance of said void deed the United States government was induced to convey the whole of said claim to the other co-owners above named, thereby carrying the legal title of plaintiff's interest to the grantees in the patent. Now, the title to plaintiff's interest in said claim having passed away from it by the circumstance of said void deed being recognized as valid, the grantees of that interest became trustees thereof, holding the same for the use and benefit of the real owner the same as if the title, by mistake, had been conveyed and recorded in the name of a stranger. That trust is implied by operation of law upon the circumstances mentioned, and does not depend upon the alleged express agreement for reconveyance claimed to have been made by Largey on behalf of plaintiff at the time the void deed was executed, nor upon

any action of Largey because his attempted conveyance was void, as all parties admit, and in fact did not divest plaintiff of its interest. The void deed figured in the transaction as the mere circumstance which misled the government to grant plaintiff's interest, along with the rest of the lode, to the grantees above named. Plaintiff did not own or claim an interest adverse to any other claimants in said lode, but it owned an interest in conjunction with and recognized by the other claimants and patentees of said lode. (*Hunt v. Patchin*, 35 Fed. Rep. 816.) And plaintiff, having come into ownership after application of patent, for the sake of convenience in obtaining the patent, it was thought expedient by those assuming to act that plaintiff's interest should be deeded over to the other grantees in the patent in order to make it appear to the government's agents that the persons to whom the patent was issued were the owners of the whole of said claim. But that deed was void, and therefore when the patent was issued the legal title of plaintiff's interest, which it had not parted with, was conveyed to the grantees named in the patent. It appears that the grantees in the patent, although made parties to this action, have never come in and denied the foregoing facts, and the record shows that Cobban obtained such conveyance for a mere nominal sum as consideration, and with knowledge of the facts upon which the law raises a trust in the patentees of said land in favor of plaintiff to the extent of its interest. (2 Pomery's Equity Jurisprudence, § 1048.) So that Cobban is in no position to claim equities in his behalf which the grantees of said patent could not have invoked. It appears to me to be a case of constructive trust, arising by operation of law and should be executed as directed by the judgment of the trial court. (*Hunt v. Patchin*, 35 Fed. Rep. 816; *Lakin v. Sierra Buttes G. Mining Co.*, 25 Fed. Rep. 337; *Hardy v. Harbin*, 4 Saw. 526; *Wilson v. Castro*, 31 Cal. 421; *Salmon v. Symonds*, 30 Cal. 301.)

The point is raised that plaintiff was not competent to receive and hold said interest in the mining claim, because the acquisition of such property was not specially within the scope of the object and purpose of the corporation, as expressed in its articles of incorporation. I do not think that point could

be maintained so as to avoid the title of plaintiff to said property in favor of a stranger. A corporation organized for special purposes, specified in the articles of incorporation, might, in transacting that business, necessarily come into the ownership of property of a class not within the objects for which it was incorporated. The collection or enforcement of obligations due the corporation might necessarily, in the course of the transaction of its business, bring it into ownership of property, the acquirement of which is not within the special object and purpose for which the company was organized, as expressed in its articles of incorporation. But it would hardly be seriously urged in such event that the title of the corporation as to such property was void in favor of a stranger who undertook, unlawfully, to assume and hold the property in question. Of course, cases arise where agents of a corporation have been held liable to the stockholders or others interested and injured by a departure from the scope and purpose of the company in its transactions, but such complainants are not strangers or without interest in the conduct of the corporation. And the commonwealth may also interfere and forfeit the charter and wind up the affairs of the corporation in certain cases for abuse of its charter privileges by unlawful use or departure therefrom: But no cases have been cited, and probably cannot be found, where strangers have been heard to raise such a defense to their unwarranted claims upon the property of a corporation. To the contrary may be cited the following cases. (*First Nat. Bank v. Roberts*, 9 Mont. 331; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439; *National &c. Mining Co. v. Clarkin*, 14 Cal. 544; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.)

I concur in affirming the judgment of the trial court.



CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1893.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.
Hon. EDGAR N. HARWOOD, } Associate Justices.
Hon. WILLIAM H. DE WITT, }

18	363
14	135
24*	187
36*	959
18	363
17	458

WOODMAN, RESPONDENT, v. CALKINS ET AL., APPELLANTS.

[Argued October 8, 1892. Decided October 2, 1893.]

BOND—Sureties—Failure of principal to sign.—In an action brought by an officer upon an indemnity bond given him to maintain an attachment it is no defense on behalf of the sureties that they signed such bond only on the condition and understanding that their principal should sign it before its delivery, which was not done, and of which condition the officer was ignorant, as such bond would be a valid obligation of the sureties without the signature of the principal procuring and delivering it, and his failure to sign would affect no substantial right of the sureties. (*Hoskins v. White*, ante, page 70; *Wibaux v. Grinnell Livestock Co.*, 9 Mont. 154; *Ney v. Orr*, 2 Mont. 559; *Pierse v. Miles*, 5 Mont. 548; *Hedderick v. Ponlet*, 6 Mont. 848, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

Action on bond. Judgment on the pleadings was rendered for the plaintiff by HUNT, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This action is commenced by plaintiff, as constable, against the defendants, who were sureties on an undertaking to indemnify plaintiff, as constable, for holding property which he had seized on an attachment, and which was claimed by persons other than the defendant in the attachment suit.

Archie Beaton brought suit against Patrick Leo, in the justice court, to recover seventy-four dollars. A writ of attachment was issued in that action, and given to plaintiff, a specially deputed constable, for service. The constable levied upon the sum of forty-five dollars and eighty-five cents in the hands of P. J. Touhy.

Wise & Goodkind served written notice upon the constable, claiming the moneys, so levied upon, as belonging to them, and demanding the delivery of the same to them. The constable informed the plaintiff in the action of that fact. Thereupon the defendants executed and delivered to plaintiff a written undertaking, which is attached to the complaint in this action. In consideration of that undertaking the constable paid over the money so levied upon to the plaintiff in the action. The undertaking was to the effect that the parties thereto would save the plaintiff herein harmless from said claim of Wise & Goodkind.

Afterwards Wise & Goodkind brought action against this plaintiff, and recovered judgment against him for the amount which they had so claimed as their property in the hands of said Touhy.

Plaintiff now brings action against these defendants, sureties on said undertaking, for damages by reason of the judgment against him, which he had paid.

The undertaking which these defendants gave, named as parties thereto, Archie Beaton as principal, and R. M. Calkins and J. S. Featherly as sureties. It was executed by the sureties only, and not by the principal. The above facts appear by the complaint in this action.

The answer, among other things, set forth "that it" (the undertaking or bond) "was signed by these defendants as sureties, on the condition and understanding that he" (said Beaton) "should sign it before it should be delivered; that said Beaton

never signed the same, nor did any one in his behalf, and that these defendants never intended, nor consented, that it should be delivered without his signature."

On the motion of plaintiff, the court rendered judgment in favor of plaintiff, upon the pleadings.

Did the plea of defendant, as to the agreement in reference to the delivery of the undertaking, form an issue which should have been tried? If so, the judgment on the pleadings is contended by appellants to be error.

David B. Carpenter, for Appellants.

R. R. Purcell, for Respondent.

The undertaking pleaded as the foundation of the suit is a valid statutory undertaking, and is a valid obligation without the signature of the principal. (*Pierse v. Miles*, 5 Mont. 549; *McIntosh v. Hurst*, 6 Mont. 287; *Dair v. United States*, 16 Wall, 1; *Tidball v. Halley*, 48 Cal. 611; *Goodyear Dental Co. v. Bacon*, 148 Mass. 542; *Goodyear Dental Co. v. Caduc*, 144 Mass. 85.)

HARWOOD, J.—The foregoing statement of the case by Mr. Justice De Witt, is sufficient for the purposes of this decision. The judgment of the trial court, in our opinion, should be affirmed.

Beaton, the principal, who procured the undertaking to be executed by the sureties on his behalf, and received the attached money from the officer (which money was not subject to the attachment), was liable therefor, without signing the undertaking, in an action by the officer, as well as to reimburse his sureties for whatever they were compelled to pay by reason of their engagement in said undertaking, on behalf of the principal. Both the principal and sureties could have been sued in the same action, or if the principal was not joined in the action brought by the officer against the sureties, they could have required the principal to be brought in and made party defendant in the action against the sureties, and have execution levied against the principal first. (*Hoskins v. White, ante*, page 70; *Wibeaux v. Grinnell Livestock Co.*, 9 Mont. 154.)

Thereby liability for the same damage would have been fastened upon the principal debtor, along with the sureties. No substantial right of the sureties was lost, by reason of the principal failing to sign said undertaking. Nor are they even inconvenienced thereby, for had they made the principal a party defendant with them in the action against the sureties, the instant there were shown grounds for recovery of damages from the sureties for the default of the principal, the same showing would have been ground for judgment against the principal obligor also. The defense alleged by the sureties that the undertaking "was signed by these defendants as sureties on condition and understanding" that the principal, Beaton, should sign it also; "and that these defendants never intended nor consented that it should be delivered without his signature," involves no fact or condition, which, under the law, would have given them any right or remedy for reimbursement or contribution, which they do not already possess. Therefore, no substantial defense was set up by the answer in that respect, and the court ruled correctly in disregarding it. (*Wibeaux v. Grinnell*, 9 Mont. 154, and *Hoskins v. White*, *ante*, page 70.) The law, as expounded in the case of *Ney v. Orr*, 2 Mont. 559, when rightly considered, would lead to the same conclusion, because the pleading in the case at bar does not show that the officer who turned over the attached property to Beaton on receiving said undertaking for his protection in so doing, was at all cognizant of the "condition and understanding" of the sureties that Beaton, the principal, should sign the undertaking before it was delivered; or that defendants "never intended that it should be delivered" without the signature of Beaton, principal. It has been held that such statutory undertakings are good and binding obligations of the sureties without the signature of the principal, who procures and delivers the same on his behalf. Therefore, so far as the undertaking shows on its face, the officer and his legal advisers, were justified in accepting it as a good and valid obligation of the sureties, although not signed by the principal. (*Pierse v. Miles*, 5 Mont. 549; *Hedderick v. Pontet*, 6 Mont. 348.)

The argument, that under all circumstances or in all engagements on obligations, it cannot be affirmed as a legal propo-

sition, that it would be of no material legal advantage to the sureties to have the principal's signature on the bond or undertaking, has no force in this case. The question in this case must be decided, and decided on the legal conditions involved in it. If the sureties have lost any material legal right by reason of the omission of the principal to sign this undertaking (obligating himself to do as principal what the law obliges him to do without the undertaking) it has not been pointed out or in any manner suggested in this case. It is well known that there are bonds and obligations whereby the liability of both principal and sureties arise from, and is founded upon, the instrument alone, and where the principal could neither be held liable directly to the obligee, nor collaterally as between him and the sureties without his signature, but such is not the case at bar. And we do not perceive how general suggestions of doubts respecting those cases are applicable in deciding this, or will aid in correctly deciding such other cases when they arise.

An order will be entered affirming the judgment of the trial court.

PEMBERTON, C. J., concurs.

DE WITT, J. (*concurring*).—I am not wholly satisfied that it is of absolutely no advantage to the sureties to have the principal's signature on the undertaking; nor am I satisfied that, under all circumstances, sufficient evidence of the liability of the signing sureties would also be alone proof of the liability of the nonsigning principal. I think cases might arise where the proof would have to go a pace further. But the suggested advantage to the sureties is probably not sufficiently substantial in this case to be noticed. I therefore concur in the affirmation.

STATE, APPELLANT, v. MIDDLETON, RESPONDENT.

[Submitted June 15, 1893. Decided October 2, 1893.]

Costs in Criminal Case—County attorney's fees.—The fees allowed a county attorney by the act of March 14, 1889, for drawing an information and for the trial of a case are not now taxable against a defendant, such fees being no longer payable either to the county attorney, by reason of that officer's compensation being limited to a salary by the act of March 6, 1891, or to the county treasurer, by reason of county attorneys being omitted from the requirement of the latter act that fees collected by sheriffs and other named officers be paid into the county treasury.

Appeal from Fifth Judicial District, Beaverhead County.

Conviction for practicing medicine without a certificate from the board of medical examiners. Defendant's motion to retax costs was granted by GALBRAITH, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal by the state on the question of law reserved. (Crim. Proc. Act., § 396.) Defendant pleaded guilty on an information charging him with practicing medicine without a certificate from the state board of medical examiners. He was sentenced by the court to pay a fine of \$100 and costs. The county attorney filed a memorandum of costs, which included, among other items, a fee for the county attorney for drawing the information of \$5, and also a fee for the trial of the case, \$20. The defendant moved to retax the costs, objecting to the items of the county attorney's fees above mentioned. This motion was granted, and from this order and the question of law reserved the state appeals.

Under the act of March 14, 1889 (16 Sess. Laws, p. 147), the county attorney received his compensation by salary and fees. In first-class counties he received a salary of \$800, in second-class counties of \$600 per annum. (Act March 14, 1889, § 3; 16 Sess. Laws, p. 149.) In addition to these salaries, all county attorneys received certain fees for particular services, providing, however, that their total compensation (salary and fees) should not exceed \$3,000 per annum. (Act March 14, 1889, § 9; 16 Sess. Laws, p. 150.) Later, and after the admission of the state to the union (November 8, 1889) was enacted the salary law of March 6, 1891. (2 Sess.

Laws, p. 235.) Section 1 of that act provides that the fees, costs, percentages, penalties, allowances, and all other perquisites, of whatever kind, which by law any sheriff, treasurer, county clerk, and recorder, clerk, or deputy clerk of the district court, assessor, county superintendent of common schools, is authorized to receive for any official service, shall be by him turned into the county treasury, and shall be the property of the county. Section 3 of the act provides "that the said officers named in section 1 of this act shall each be allowed to receive, as annual compensation for their services as officers of their respective counties, by classes, as follows." Then follows a list of the county officers and their compensation in the counties of the different classes. In this list are found county attorneys, with a salary of \$2,500, in the first-class counties; \$1,500 in the second-class counties; and \$1,200 in the third-class counties.

The act further provides: "It being the intent and meaning of this act to limit the maximum actual [annual?] compensation from all sources of the officers named under this act, to the sums named in this section."

The position of the state on this appeal is that although the county attorney does not receive the fees, as under the law of March 14, 1889, for his own compensation, yet that he is allowed to tax them up in the judgment against a convicted defendant, and is required to collect them and turn them into the county treasury.

Henri J. Haskell, attorney general, and *H. J. Burleigh*, for the state, Appellant.

DE WITT, J.—It is not claimed that the county attorney has now any right to tax up costs under the law of March 14, 1889, as a compensation for himself. It is conceded that his salary is his full and only compensation. But the state contends on this appeal that the county attorney should tax costs, as provided in the law of 1889, against a convicted defendant for the benefit of the state, and that said costs should be collected for the state. We cannot agree to this view. Sections 8 and 9 of the law of 1889 provide the compensation of county

attorneys. The county paid this by way of salary and fees, and those fees in a particular case were taxed as costs against the defendant convicted in that case. Then came the act of 1891, and provided another and different compensation for the county attorneys, to wit, a salary alone, and which was to be, and is now, his only compensation. (2 Sess. Laws, § 3, p. 237.) So the act of 1889 was swept away, as providing compensation for county attorneys, and the act of 1891 took its place. Therefore, there is now no law for taxing and collecting these fees for the county attorney himself, and there was no law for taxing these fees for the benefit of, and paying them into, the county treasury; for section 1 of the act of March 6, 1891, provides for the payment into the county treasury of the fees collected by sheriffs, treasurers, and other officers, naming them, but the section omits to mention county attorneys. Therefore, this seems to be the result. As the fees mentioned in section 9, act March 14, 1889, are collectible and payable neither to the county attorney nor to the county treasurer they are not taxable against the defendant. The judgment of the district court is affirmed.

The chief justice and HARWOOD, J., concur.

18 370
19 504
18 370
24 314

STATE EX REL KELLOGG v. DISTRICT COURT OF
FIRST JUDICIAL DISTRICT.

[Argued May 30, 1893. Decided October 2, 1893.]

PHYSICIANS AND SURGEONS—*Medical examiners—Appeals.*—While the jurisdiction bestowed upon the district court by the constitution cannot be abridged by the legislature, it may invest such court with additional jurisdiction in harmony with its character and not a usurpation of the constitutional powers of any other court, and therefore the provision of the act to regulate the practice of medicine (Sess. Laws 1889, p. 175) allowing an appeal to the district court by the aggrieved party in case of the revocation or refusal by the board of medical examiners of a license to practice medicine cannot be held to contravene article VIII, section 11 of the constitution providing that the district court shall have appellate jurisdiction in all cases arising in justices' and other inferior courts, the latter provision not being prohibitory in form.

SAME—*Same.*—An appeal by a physician to the district court from the action of the board of medical examiners in revoking his license to practice his profession is

not nugatory in that the act allowing such appeals prescribes no rules to guide the district court in adjudicating that class of cases.

MANDAMUS.—*District court.*—*Mandamus* is the proper remedy to reinstate in the district court an appeal properly brought within its jurisdiction, but which it dismissed on the ground of want of jurisdiction.

Original proceeding. Application for writ of mandate to compel the district court to reinstate an appeal which it had dismissed. Writ granted.

B. P. Carpenter, and J. W. Kinsley, for Relator.

Henry N. Blake, and C. B. Nolan, for Respondent.

HARWOOD, J.—Application is made herein for a writ of mandate, directed to the district court of the first judicial district, requiring it to entertain the appeal of relator from the action of the board of medical examiners of the state of Montana in revoking relator's license to practice medicine in this state.

It appears that, pursuant to the provisions of the statute in that respect made and provided (Act to Regulate the Practice of Medicine, etc., Sess. Laws 1889, 175), relator was proceeded against before said board of medical examiners upon certain charges alleged to constitute "unprofessional, dishonorable, and immoral conduct" in the practice of said profession, and, after hearing, said board found relator guilty as charged, and thereupon revoked his license to practice medicine and surgery in this state. An appeal was duly prosecuted from the decision of said board to the district court of the first judicial district in and for Lewis and Clarke county, and, upon the docketing of said appeal, motion to dismiss the same was interposed by said board of medical examiners on the following grounds: "(a) That the papers in said cause are not properly in court; (b) That there is no provision of law by which an appeal can be taken, in that the law purporting to permit an appeal is in contravention of the constitution of the state of Montana, and void; (c) That there is no procedure provided by law by which and through which a hearing on appeal can be had; (d) That the action of the medical board is final under the law, except in so far that its action may be reviewed by the district court, through the medium of summary process." Thereupon the

court, after consideration, sustained the motion and dismissed said appeal, and the same grounds are urged in this proceedings as reasons for the denial of the writ of mandate prayed for; therefore the only question involved in this consideration is whether or not such appeal would lie in favor of relator.

The act of the legislature, cited *supra*, after providing for the organization of said board of medical examiners, and prescribing its duties in respect to the examination of applicants desiring to practice medicine and surgery in this state as to their qualifications to be licensed thereunto, and for the issuance of a certificate of license by said board to persons found duly qualified, further provides that "such board may refuse or revoke a certificate for unprofessional, dishonorable, or immoral conduct, or refuse a certificate to any one who may publicly profess to cure or treat disease, injury, or deformity, in such a manner as to deceive the public. In all cases of refusal or revocation, the applicant, if he or she feel aggrieved, may appeal to the district court of the county where such applicant may have applied for a certificate." This provision for appeal in such cases appears to have been held unconstitutional by the district court in dismissing relator's appeal, as aforesaid.

The proposition is advanced that the district court cannot lawfully entertain an appeal from the action of said board, as provided for, because the constitution provides that the district court "shall have appellate jurisdiction in all cases arising in justices' and other inferior courts, in their respective districts, as may be provided by law, and consistent with this constitution." (Art. VIII, § 11.) Respondent contends that the proper interpretation of this clause of the constitution is, that the district courts can entertain appeals from justices' and inferior courts only; and such must be the construction put upon it to sustain the ruling of the court below. But the provision of the constitution under consideration is not in such prohibitory form, and we do not think that provision imports such intention. Even appeals which may be allowed from justices' and inferior courts are left by the constitution within the control of the legislature.

The construction contended for by respondent would introduce a radical change in the system provided for the control

of certain important public affairs, which has prevailed in this jurisdiction throughout the territorial *regime*, and which provisions are still contained in the body of the statute laws adopted by the constitution for state government; for that holding, logically followed out, would cut off the appeal to the district court, provided by statute, from the action of the board of county commissioners, in respect to the allowance or disallowance of claims against the county (Comp. Stats., div. 5, §§ 764, 765), appeals from the award of road viewers in laying out highways (*supra*, § 1821), appeals from the award of the commissioners in proceedings where the power of eminent domain is exercised (Code Civ. Proc., §§ 607, 608), and perhaps other appeals in similar cases. All such appeals from the action of the board to the district court of the proper district are provided for by statute in favor of the party aggrieved; and it is very doubtful that the legislature would have made provision for action of boards in such important affairs as those statutes contemplate, if such action was final, as it would be, in many respects, without provision for appeal. It is well known that a review by a court through the medium of *certiorari* would, under the rules governing such writs, be inadequate to reach a complete consideration of the case on the merits, with power to render such judgment as the justice of the case might warrant, and taking away the right of appeal in such cases might lead to declaring those numerous statutes void *in toto*; on the ground that the legislature would not have invested such boards with the large powers committed to them if their action had been understood to be final, and beyond review, through the appeal provided in the same statute. It is therefore observed how extensive and radical is the effect contemplated by the framers of the constitution in the particular under consideration, if the interpretation contended for by the respondent expresses the intention of its framers. But we think that if such was the intention, it would have been indicated without uncertainty, by a provision in the prohibitory form, unlike the clause under consideration, but something like the form unto which said clause is construed by the holding contended for in this proceeding. But, as before observed, the language of the constitution under consideration is not in such

prohibitory form; nor do we think the framers of that instrument intended such interpretation, or the radical change in the system of laws, so long prevailing in this jurisdiction, to which it leads, without any other provisions to supply the place of those laws uprooted thereby. (*State v. Hickman*, 11 Mont. 544.)

While it is a fundamental principle that the legislature cannot interfere with the existence or abridge the jurisdiction bestowed upon courts by the constitution it has been held by eminent authority that the legislature may invest such courts with additional jurisdiction. This subject was extensively considered in a singularly able opinion delivered by the court of errors and appeals of New Jersey, in a case decided in 1869 (*Harris v. Vanderveers' Ex.*, 21 N. J. Eq. 424), reaching the conclusion that, "an extension of the jurisdiction of a court, such extension being in harmony with its character, and not being a usurpation on the inherent powers of any other court, is not within the constitutional prevention." The same proposition is announced in Wells on Jurisprudence, 54; and we have been unable to find any authorities, either in cases or in works on constitutional law, to the contrary effect. Respondent's counsel cite some early cases from California in support of their view; but the court in those cases had under consideration not only a different judicial system, but entirely different constitutional provisions to construe, as shown in *Caulfield v. Hudson*, 3 Cal. 389, and others cited. There the constitution invested the district courts with original jurisdiction in law and equity cases, and was silent as to any appellate jurisdiction in those courts; but the controlling provision in those cases seems to be that the California constitution empowered the legislature to "give the county courts original or appellate power, or both, in special cases and in cases arising in justices' courts"; therefore the constitution provided, in effect, where the legislature should direct the appeal from the justice court in the forcible entry case there under consideration, and, we think, under like conditions, sound principles of construction and rules of logic should lead to such conclusion. The legislative provision for appeal from the justices' to the district court, as was remarked in the Caulfield case, seemed to be di-

recting the course of such appeals in a different path from that plainly marked out by the constitution, which, in effect, would take from the other courts that portion of the judicial power which the constitution had directed to be committed to it; and that would infringe the principle above adverted to—that the legislature has no power to abridge or divest a court of the jurisdiction which the constitution commits to it. All other cases cited from California appear to follow the Caulfield case, and we think they rest on conditions widely distinguished from those under consideration in the case at bar.

The question here, unlike that before the California court, relates to extension of jurisdiction of the district court over a class of cases not especially mentioned in the constitution, which may arise by virtue of statutory provisions, where such provision in no way interferes with the constitutional jurisdiction of any court in the judicial system. The statute here under consideration takes no constitutional jurisdiction from any court in this state, but invests the district court with jurisdiction of a class of important cases, to come into it, by way of appeal from the action of the board of medical examiners; and other statutes on the same footing provide for other important cases to come into the district court by way of appeal from the primary action of other boards or commissioners.

It is also insisted by respondent's counsel that the appeal in question is nugatory, because no rules of practice have been prescribed in said act of the legislature to guide the district court in adjudicating that class of cases. We do not think relator's right of appeal, with such a hearing as the legislature contemplates he shall have in the district court, can be denied, because no special rules of practice to be followed therein were prescribed. On the same ground, it might be affirmed that the board of medical examiners had no power to enter upon a hearing of charges, and determine whether a physician complained of was guilty of such conduct as authorized the revocation of his license to practice medicine and surgery in this state. The act of the legislature providing for said board, and investing it with such power, does not define the procedure which shall govern such investigations before the board. No doubt the legislature contemplated that such proceedings

should be conducted in such an orderly manner as that no substantial right would be denied the accused. (*State v. Schultz*, 11 Mont. 429.) With how much more force, then, can it be asserted that the legislature, in placing the case within the jurisdiction of the district court by appeal, on behalf of the party feeling aggrieved, contemplated that said court, being wise in the law and all its analogies, would adopt such appropriate procedure in the adjudication as would vouchsafe to the accused and to the prosecution a proper hearing; and thereupon such judgment would be pronounced as the law and justice of the case would warrant on the facts shown. The case is brought into the district court by appeal, without restriction, and this would seem to contemplate that the court, thus being clothed with power to try the case and to pronounce judgment, would apply the appropriate procedure. (*People v. Jordan*, 65 Cal. 646.) For what purpose did the legislature provide that a party feeling aggrieved might appeal the case into the district court? The party appealing would have been deprived of a license to practice medicine within this state either by refusal or revocation thereof by the board. Now, when the case is raised into the jurisdiction of the district court by appeal, was it not contemplated that thereby said court was placed in the attitude of the board of medical examiners, with power over its decision to investigate the case, and determine whether or not the appellant, under the law, ought to be denied a license, or whether such license ought to be revoked because of "unprofessional, dishonorable, or immoral conduct" in the practice of his profession? (*State v. Board of Medical Examiners*, 10 Mont. 162.)

The statute provides that the court may revoke the license of an attorney to practice law in the courts of this state "for malconduct in his profession" (Comp. Stats., § 106, p. 620); and no special rules of practice for the institution of a charge alleged to constitute such malconduct on the part of an attorney, and the trial thereof, are prescribed in the statute, except the obvious provision that the accused shall be notified of the charge against him, and be heard in his defense, which right probably no court would neglect to provide for on behalf of the accused. In such cases a court must direct the course of

its own procedure in many important respects, without special provision of statute made for those particular cases; but for that reason it would not refuse to exercise the duty and authority imposed upon it by statute.

It is further objected that the writ of mandate is not the proper proceeding herein to reinstate the case in the district court, but we are of opinion that such objection is untenable; that this proceeding is a proper remedy where a court refuses to entertain and adjudicate a case properly brought within its jurisdiction, and there is no objection that this case was not properly appealed into the jurisdiction of the district court.

An order will be entered directing the writ of mandate to issue.

Writ issued.

DE WITT, J., concurs.

FIRST NATIONAL BANK OF HELENA, APPELLANT,
v. NEILL ET AL., RESPONDENT.

[Argued September 5, 1893. Decided October 2, 1893.]

13	377
d15	100
15	175
34*	180
35*	228
38*	883
13	377
16	59
17	541
18	377
18	413
13	377
25	27

ATTACHMENT—Judgment against garnishee on default.—Where a county board answers to a garnishment that it has money due to a firm of which the defendant in the attachment suit is a member, but that it does not know to which member it may be due, and a suit is afterwards brought by the attachment plaintiff against the board and such defendant, the failure of the board to appear or answer in such suit does not entitle the attachment plaintiff to a judgment against it where it is determined upon the trial that the board when garnished had no funds belonging to its said codefendant.

RETAXATION OF COSTS—Docket fee.—The action of the trial court in refusing to tax a docket fee upon the granting of a motion to retax costs may be reviewed upon appeal from the judgment.

SAME—Docket fee—Statutory construction.—The provision of section 509 of the Code of Civil Procedure, that where the moving party prevails upon a motion to retax costs improperly included in a memorandum of disbursements "there shall be taxed," as a part of the costs of such motion, a docket fee of twenty-five dollars, is mandatory, and the taxation of such fee upon the allowance of a motion is not a matter within the discretion of the court.

Appeal from First Judicial District, Lewis and Clarke County.

Action by judgment creditor against garnishee. Judgment was rendered for the defendant below by HUNT, J. Modified and affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff herein is a judgment creditor of the defendant Henry Neill. It brings this action to obtain moneys which it claims are in the hands of defendant, the board of county commissioners, and which belong to its judgment debtor, Henry Neill. In the former action of the bank against Henry Neill, the action in which it obtained judgment against Neill, it caused notice of garnishment to be served on the board of county commissioners. To that notice of garnishment the commissioners replied that there was a contract between the commissioners and R. A. Bell & Co., and that that company consisted of R. A. Bell and Henry Neill, the defendants herein; that there was a considerable amount of money remaining due to said Bell & Co.; and that "the board does not know to whom they may be due, other than above stated, but they are due to whomsoever may be entitled thereto under the contract." In this action answers were filed by R. A. Bell and Henry Neill and John S. M. Neill. The board of commissioners filed no answer. The plaintiff alleges in its complaint that Bell had sold his interest in the partnership to Henry Neill, but this allegation was abandoned upon the trial. The case was tried to a jury. Upon the trial, it was shown that there were in the possession of the board of commissioners, on account of the contract mentioned, fifteen hundred and eighty-one dollars and fourteen cents. It was admitted by all parties that defendant Bell was entitled to receive of this money nine hundred and sixty-five dollars and eleven cents. Evidence was taken, and the jury made findings, which were adopted by the court, as follows: Henry Neill assigned his interest in the contract to John S. M. Neill, February 4, 1892, which was prior to the garnishment in the case of the bank against Henry Neill. N. J. McConnell had a third interest in the firm of R. A. Bell & Co. Henry Neill and John S. M. Neill had drawn out all their share in the moneys upon said contract. The sum of five hundred and thirty dollars, in addition to the amount awarded to Bell, now in possession of the board, is the property of N. J. McConnell. On the 25th of March, 1892, the date of the garnishment of the board of commissioners, Henry Neill had no interest in the profits or

proceeds of said contract. Prior to that date he had drawn out, or sold to John S. M. Neill, all his interest in the contract, and the county commissioners knew this fact before the service of the garnishment. Upon these findings the plaintiff asked the court for judgment against Henry Neill and John S. M. Neill and the commissioners of Lewis and Clarke county. This motion was by the court denied, and judgment was ordered entered against the plaintiff for costs. The plaintiff appeals from this judgment.

Toole & Wallace, for Appellant.

Word & Smith, for Respondent.

DE WITT, J.—It is observed that the plaintiff herein was a judgment creditor of the defendant Henry Neill, in an action other than the one at bar. In that action the defendant herein the board of county commissioners was garnished. It replied that under a contract between it and the firm of R. A. Bell & Co., of which Henry Neill was a member, there were moneys due to that firm. On the trial of this case, it developed that part of the moneys in the hands of the board of county commissioners belonged to Bell. This was conceded by all parties, and was so found. It also appeared, and was found, that the remainder of the moneys belonged to one N. J. McConnell, a member of the firm of Bell & Co. So that the result of the trial established that the board of commissioners, garnishee in the case of *Bank v. Henry Neill*, had no money whatever belonging to Henry Neill. Why, then, should the district court enter a judgment against the board of commissioners, the effect of which would be to require that board, as garnishee, to pay moneys to the judgment creditor of Henry Neill, when it was determined that such board, garnishee, had no funds of said Henry Neill, the judgment debtor? The plaintiff, and appellant herein, answers this query by relying upon the fact that in this case the board of commissioners, one of the defendants herein, did not answer in this case, or appear in the trial, and as a consequence the allegation of the complaint that the board had funds of Henry Neill must be taken as true. We cannot concede this view. The board of commissioners had

no interest in this action. It held moneys due to R. A. Bell & Co., as it stated in its reply to the garnishment. It was of no consequence to it how this money was distributed among the members of the firm of R. A. Bell & Co. The board was simply a stakeholder. The matter as to whether the judgment debtor of the bank had an interest in this stake was litigated, and determined adversely to the bank, plaintiff. This was determined on issues made by defendants' answer. The findings are not attacked. They are therefore all true. Henry Neill had no interest in the funds in the hands of the board of commissioners. Therefore, there was nothing for the bank to reach, and judgment in its favor against the board of county commissioners was properly refused.

The plaintiff, having appealed from the judgment, asks us to review the action of the district court in refusing to tax a docket fee of \$25 against the defendants, upon the granting of plaintiff's motion to retax the costs. (Code Civ. Proc., § 509.) Such review may be had on an appeal from the judgment. (*Rader v. Nottingham*, 2 Mont. 157; *Hibbard v. Tomlinson*, 2 Mont. 220.)

The Code of Civil Procedure has the following provisions: "The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding; which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding." (§ 507.) "But such memorandum need not include the legal fees and costs of any officer of the court, or any witness fees when an affidavit of such witness' attendance is required by law to be made." (§ 508.) A witness is required by law to make his affidavit of his per diem and mileage. (Code Civ. Proc., § 511.) The defendants filed their memorandum of costs and disbursements, which were duly verified. Such memorandum included, as it need not (§ 508), sheriff's costs, at \$4.40, and witnesses fees of John P. Ketchum, \$3, as disbursements by defendants. The plaintiff moved to retax the costs. On this

motion the court reduced the sheriff's fees from \$4.40 to \$2.20, and struck out the witness fees of John P. Ketchum, \$3, because, although he was summoned by defendant, he was not called to testify, and appeared to be an unnecessary witness.

The plaintiff, having prevailed in its motion, and having succeeded in retaxing the costs, insists that the court should tax as a docket fee the sum of \$25. Counsel relied upon section 509 of the Code of Civil Procedure, which is as follows: "If any party shall include in such memorandum any item to which he is not entitled, or if any clerk, sheriff, referee, or other officer shall include such item in the taxed costs, and a motion to retax the same shall be made by the party against whom the same is taxed, and if such motion to retax shall prevail, there shall be taxed as a part of the cost of such motion, a docket fee of twenty five dollars, and judgment therefor, with the other costs allowed by law, shall be entered against the party, sheriff, referee, clerk, or other officer who so unlawfully taxed the same, and the same may be offset against any costs or judgment in favor of the party or officer so improperly taxing such cost, and against the party making such motion; or if no such judgment exists, the court may direct that the party making such motion have execution therefor." The court refused to tax this docket fee. This is assigned as error.

The appellant contends that this provision for taxing this \$25 is mandatory. The respondents insist that it is directory only, and that, therefore, it was a matter of discretion on the part of the court. The language of section 509 is, without question, mandatory. It is, "shall be taxed." Is there reason, under the rules of construction, why this clear mandatory language should be construed to be directory? Before a provision, mandatory in terms, is held to be directory, some reason should be advanced for so doing. This section of the statute (509) calls this \$25 a "docket fee." The term "docket fee" would seem to describe a fee for docketing something. But this fee is not charged for docketing the motion, but is to be allowed upon the prevailing of the same.

A docket fee is one that is charged "of course," as, for instance, for docketing a case or a judgment. But considering the meaning of the word "docket" as nearly as that meaning

will apply to the circumstances surrounding its use in this section, it would appear to be indicated that this should be considered a "docket fee," and taxable "of course," if the motion prevails, and that would seem to be the significance of the use of the word "docket" in describing this fee of \$25. It is to be observed that this \$25 docket fee, so called, is aimed, not only at an offending party, but at an offending officer, such as a sheriff, referee, or clerk. If either one of these parties offend by charging and filing accounts to which he is not entitled the injured person against whom the charge is made is obliged to obtain that charge to be set aside; otherwise he is liable to pay it upon an execution on the judgment. He therefore attacks that wrong by moving to retax the costs. He is put to the labor, and perhaps expense, of making this motion. If the wrongful charge had not been made against him, he would not have had this labor. We are of opinion that the statute intends to give him compensation for this labor and expense. But it does not give him this compensation unless he demonstrates that his contention as to the wrongfulness of the charge against him is correct; that is, if he prevails in his motion, he is to have a \$25 fee. We do not understand that the person against whom this penalty is taxed has any cause for complaint. If he is a party, he knows what he has "necessarily disbursed" (§ 507), and it is his own fault if he charges more. If he is an officer, he knows what fees the law allows him, and he is not excusable in charging more. If such a thing occurred as one being in doubt as to a charge, he could move the court for its allowance, without risk of subjecting himself to the penalty.

As to whether language should be construed as mandatory or directory, the doctrine is well stated in *Wheeler v. City of Chicago*, 24 Ill. 105, 76 Am. Dec. 736, as follows: "The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word 'shall' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction. But if any right to

any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely." So in the case at bar. The moving party's right to his compensation given by statute for the trouble and expense of his motion depends upon giving the word "shall" an imperative construction; and as remarked in the Illinois case, "the presumption is that the word was used in reference to such right or benefit." (See, also, *Blake v. Portsmouth &c. R. R. Co.*, 39 N. H. 435; *Ex parte Jordan*, 94 U. S. 251; Sedgwick's Statutory and Constitutional Law, 316-25.

We are of opinion that there is no reason why the language of section 509 should be construed to be directory, instead of being, as the text is, mandatory. The items retaxed here were sheriff's fees and a witness' *per diem*. The parties need not have put these into their memorandum. (§ 508.) But they put them in, and verified their memorandum that the items were correct, and that those disbursements had been necessarily incurred. They made the items their own, and swore that they had necessarily incurred them. But the investigation on the motion to retax showed otherwise.

This is the first time that the statute has been before this court for construction, and we have given it our careful consideration, and are satisfied that we have arrived at the intent of the legislature. We are of opinion that the view we have adopted is not only the reasonable, plain, and necessary interpretation of the statute, but that it will establish a very wholesome rule of practice. The only objection that can be urged to it is the possibility of its being, perhaps, a severe punishment to persons making innocent mistakes in taxing costs. But with the clear knowledge that must be possessed by persons taxing the costs, we think that innocent mistakes will be a very rare occurrence; and even when they do happen, it must be remembered that the innocent mistake injures the party against whom it is made quite as much as if the mistake were wholly malicious, and if any one should suffer, it is more just that it be he making the mistake, rather than he against whom it is made.

The case is remanded to the district court, with directions to tax the docket fee of \$25 against the defendants, and that the judgment, as it will be so modified, be affirmed.

Modified and affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

STATE, RESPONDENT, v. DAVIS, APPELLANT.

(Submitted August 28, 1893. Decided October 2, 1893.)

CRIMINAL PRACTICE—Separate trials.—Granting or refusing separate trials to defendants informed against jointly for misdemeanor is a matter within the discretion of the trial court, and in the absence of an abuse of discretion its action will not be disturbed.

SAME—Same—Right to cross-examine.—Defendants being tried jointly and being represented by different counsel are each entitled to cross-examine the witnesses for the state through the medium of their respective counsel.

Appeal from Seventh Judicial District, Custer County.

Conviction for conspiracy. Defendants were tried before MILBURN, J. Reversed.

Statement of the case by the justice delivering the opinion: . William Davis, John Donnelly, and Patrick Reddy were convicted upon an information charging them, jointly, with the misdemeanor of conspiracy. (Crim. Law, § 132.) Davis alone appeals from the judgment. The appellant demanded a separate trial. This was denied by the court, and the defendants were tried jointly. This denial of a separate trial is assigned as error.

Another error assigned arose out of the following facts occurring at the trial. It would seem that each defendant had his own attorney. The record states that J. E. Light, Esq., was attorney for Davis, and T. J. Porter, Esq., was attorney for Donnelly. The record recites as follows: "That upon the trial of said cause to the jury as aforesaid, the court made his order, and ruled that the defendants, by their own counsel, should select and agree upon one of the respective counsel of defendants to cross-examine the witnesses for the prosecution,

and the remaining counsel for the defendants to not cross-examine the witnesses of the state, or to take part in said cross-examination, other than by suggestions to the cross-examining counsel, who should put the questions and carry out the suggestions, to which ruling and order of the court the defendant Davis, by his counsel, duly excepted; that thereafter J. E. Light, of counsel for defendant, for and on behalf of the defendant Davis and as his counsel, declined to agree to the ruling of the court and the order as aforesaid, whereupon the court ordered and directed that T. J. Porter, of counsel for defendant, John Donnelly, and not of counsel for William Davis, conduct the cross-examination of the witness, Robert Gainsforth; that, upon the conclusion of the examination and cross-examination of said witness by T. J. Porter, J. E. Light, of counsel for defendant William Davis, aforesaid, requested and demanded that he, the said Light, be permitted and allowed to cross-examine said Robert Gainsforth, all of which the court refused, but extended the same privilege of suggesting to T. J. Porter as heretofore made by the court, to which refusal the said Light duly excepted."

These, as above set forth, are the alleged errors now presented by appellant.

Middleton & Light, for Appellant.

DE WITT, J.—The first contention of appellant cannot be sustained. Section 302, Criminal Practice Act, is as follows: "When two or more defendants are jointly indicted for any felony, any one defendant requiring it shall be tried separately; in other cases defendants jointly indicted shall be tried jointly or separately, in the discretion of the court." The offense tried was a misdemeanor. (Crim. Laws, § 132.) To grant or refuse a separate trial was within the discretion of the court. No abuse of discretion is claimed. The point is overruled.

The second contention of appellant must be sustained. "The right to cross-examine is a substantial right, and, if the court prevents its exercise as to a material matter, it is error; and such error, in a criminal case, will be presumed to be prejudicial." (*Territory v. Rehberg*, 6 Mont. 467.) The

court wholly refused to allow appellant's counsel to cross-examine the prosecution's witnesses. The court evidently considered that it was allowing appellant the right of cross-examination when it permitted counsel for a defendant other than appellant to cross-examine. But the three defendants were being jointly tried for a conspiracy. It may readily have been that the interests of the defendants were adverse to each other. The facts may have been such that the policy of the defense of one would not have been that of another. It may have been to the advantage of one defendant to bring out facts from the witnesses, which facts would have been damaging to another defendant. It may have been that one defendant or more were innocent, or one defendant or more guilty. If such was the case, the facts favorable to the innocent may have been condemnatory of the guilty. Under the circumstances above suggested, it is to be expected that the interests of the defendants would be adverse to each other. Each counsel was interested to make the best case for his own client. To be sure, the court allowed appellant and his counsel to suggest to counsel for the other defendant matter for cross-examination. But appellant was thus compelled to present his case to the jury filtered through a medium which may have been adverse and unfriendly to him. This was not the free cross-examination to which appellant was entitled. No matter how conscientious Donnelly's attorney might be, still he was Donnelly's attorney, and not Davis', the appellant's. He had at stake Donnelly's interests. His duty was to Donnelly, and not to Davis. He was not the proper instrument for the presentation of Davis' defense.

We are of opinion that the court, in practical effect, denied appellant, Davis, the full and independent right of cross-examination of the prosecution's witnesses to which he was entitled, and for this error the judgment is reversed, and the cause is remanded for a new trial.

Reversed.

HARWOOD, J., concurs.

GORDON, APPELLANT, v. TREVARTHAN, RESPONDENT.

[Submitted February 20, 1893. Decided October 8, 1893.]

JURORS—Quotient verdict—New Trial.—An agreement by a jury to return a "quotient verdict," whereby each member was to indicate the amount for which he thought the verdict should be, and the sum of such amounts divided by twelve should be the verdict, with an agreement to abide by such quotient, shown by the affidavits of jurymen who were induced to assent to a verdict so reached on account of such agreement, is a resort to the determination of chance, and within section 296, subdivision 2, of the Code of Civil Procedure, allowing a new trial for such misconduct on the part of the jury.

Appeal from Second Judicial District, Silver Bow County.

Defendant's motion for a new trial was granted by McHATTEN, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff appeals from an order granting a new trial. The verdict and the judgment were in favor of the plaintiff for \$167.63. The defendant moved for a new trial upon one ground only, to wit: "Misconduct of the jury." (Code Civ. Proc., § 296, subd. 2.) This section and subdivision are as follows: "The former verdict or other decision may be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of said party. . . . Second, misconduct of the jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors." In support of this motion the defendant filed an affidavit made by William J. McNamara and David Meiklejohn, two of the jurors, who deposed as follows: "That there was a disagreement among the members of the jury as to the verdict which should be rendered in said cause and a proposition was thereupon made and agreed upon by the members of the jury that each member should indicate the amount for which he thought the plaintiff should recover, if at all, and that the sums thus indicated should be added together, and the sum so found should thereupon be divided by twelve, and the

13	387
14	544
24 ^a	185
37 ^b	1
13	387
17	140
13	387
30	472

quotient thus found should be and constitute the amount in which plaintiff should recover; and said jurors agreed to abide by the result arrived at in this manner; that in this manner the agreement upon a verdict was reached, and the verdict of \$176 (\$167.63) arrived at. Affiants further state that they, and each of them, were induced to assent to said verdict on account of said proposition so made and carried out." The plaintiff, in opposing the motion, filed the affidavit of J. R. Silver, W. H. Young, Joel Crossman, and David Meiklejohn. These jurors, in their affidavit, present a somewhat different view of the conduct of the jury than that set out in the other affidavit. They say, in effect, that the jurors agreed that each one should set down an amount that he thought plaintiff should recover, and that the amount should be divided by 12; that each thereupon set down an amount, and that the total was divided by 12, and the quotient found to be \$167.63; that, after this sum was found, the jurors discussed the matter as to whether that should be the amount of the verdict, and it was unanimously agreed that said sum should be the verdict, and it was thereupon inserted in the verdict, and the jurors were asked by one of their number if that should be their verdict, and they, or most of them, answered "Yes," and no objection was made by any juror. Thereupon the foreman signed the verdict, and it was returned into court. The motion for new trial was heard upon these affidavits, and by the court granted. The plaintiff appeals from this order.

W. I. Lippincott, for Appellant.

I. Where the calculation of the jury in determining the amount of their verdict is purely informal, for the purpose of ascertaining the sense of the jury, and every juror feels at liberty to accept, reject, or qualify the result, according to his convictions, under such circumstances the jury may adopt, as their verdict, the exact quotient found, and it will be good. (*Grinnell v. Phillips*, 1 Mass. 530, 542; *Dana v. Tucker*, 4 Johns. 487; *Bennett v. Baker*, 1 Humph. 399; 34 Am. Dec. 655; *Harvey v. Jones*, 3 Humph. 157, 160; *Turner v. Tuolumne County Water Co.*, 25 Cal. 399; *Papineau v. Belgarde*, 81 Ill. 61; *Barton v. Holmes*, 16 Iowa, 252, 259; *Deppe v. Chicago*

etc. R. R. Co., 38 Iowa, 592; *Kennedy v. Kennedy*, 18 N. J. L. 450; *Guard v. Risk*, 11 Ind. 156; *Dorr v. Fenno*, 12 Pick. 526; Thompson & Merriam on Juries, 508.)

II. In order to vitiate the verdict there must be an agreement that the quotient must be taken as the verdict, and such agreement must be carried out. (Hayne's New Trial, p. 217, § 71; *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Smith v. Cheetham*, 3 Caines, 61; *Thompson v. Commonwealth*, 8 Gratt. 656.)

III. Where an agreement is reached through the "quotient process," without an agreement to be bound by the amount arrived at, and the amount is afterwards ratified by the consent of each juror, as the verdict, it is not "a resort to the determination of chance," within subdivision 2, section 296 of the Code of Civil Procedure. (Hayne's New Trial, p. 216, § 71.)

Charles R. Leonard, for Respondent.

The proceeding carried out by the jury in this case was a resort to the determination of chance. (*Goodman v. Cody*, 1 Wash. 329; 34 Am. Rep. 808; *Williams v. State*, 15 Lea, 129; 54 Am. Rep. 404.)

DE WITT, J.—The question upon this appeal is upon what the cases and books have called "quotient verdicts." See cases cited below and in the briefs of counsel. Verdicts arrived at by methods such as described in the McNamara affidavit in this case have been held bad when properly before courts on motion for new trial. But the facts vitiating such verdicts are the agreement by the jurors to go into the process of marking amounts, adding them, and dividing the same by 12, and the agreement that the result so obtained shall be the verdict, without further consideration; and the fact that such proceedings were taken by the jury in pursuance to such an agreement, and that the result so obtained was returned as the verdict. (Thompson & Merriam on Juries, § 408 et seq., and numerous cases cited; *Goodman v. Cody*, 1 Wash. (Ter.) 329, 34 Am. Rep. 815, note.)

On the other hand, it is held that a verdict reached after the quotient process having been had by the jury is not

vicious "where the calculation is purely informal, for the purpose of ascertaining the sense of the jury, and every juror feels at liberty to accept, reject, or qualify the result, according to his convictions. Under such circumstances the jury may adopt as their verdict the exact quotient found, and it will be good." (Thompson & Merriam on Juries, § 410, and cases cited and also cited in appellant's brief.) The distinction between good verdicts and bad verdicts where the quotient process has been used is well stated in a very old case, as follows: "If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is not an objection to the verdict." (*Dana v. Tucker*, 4 Johns. 487. See, also, Hayne's New Trial and Appeal, § 71.)

The question, then, in this case is, what was the nature of the resort to the quotient process by this jury? The affidavit of Meiklejohn and McNamara is clearly to the effect that the conduct of the jury was of the kind first above described—the kind which the cases hold vitiates the verdict. The affidavit of Young and others tends to present the conduct of the jury as innocent, and being simply informal, for the purpose of obtaining the sense of the jurors. Meiklejohn signed both affidavits, but McNamara stands upon his affidavit, and did not sign the Young affidavit. Our statute says that whenever any one of the jurors shall have been induced to assent to a verdict by a resort to the determination of chance, such misconduct may be proved by the affidavit of such juror. Such conduct is so defined by the statute to be misconduct. So it appears from McNamara's affidavit that at least one juror—that is, himself—was induced to assent to this verdict by reason of the quotient proceeding; so it would seem that this, under the statute, is enough to vitiate the verdict. The affidavit of Young and others is to some extent contradictory of the McNamara-Meiklejohn affidavit, but that contradiction was resolved by the district court in favor of the McNamara affidavit.

We are therefore of the opinion that the order should be affirmed if this quotient proceeding is to be considered as a "resort to the determination of chance"; for that is the language of subdivision 2, section 296, Code of Civil Procedure. This rule is that the affidavit of a juror may be taken to support his verdict, but not to attack it. (*Turner v. Tuolumne County Water Co.*, 25 Cal. 398; Thompson & Merriam on Juries, § 440, and cases cited; Hayne's New Trial & Appeal, §§ 73, 74.) Section 296, Code of Civil Procedure makes an exception to the rule, so that the affidavit of a juror may be taken to attack the verdict if the juror has assented to the verdict by reason of a resort to the determination of chance.

The California supreme court, under the same statute as we now have, held long ago that this quotient proceeding was not a resort to the determination of chance. That court said: "But, independent of authority, it is manifest that there is no element of chance in such a verdict. Each juror marks a sum, which, in his judgment, represents the true amount of damages. Neither of these sums is the result of chance; on the contrary, each is the result of the judgment or will of the juror by whom it was marked. Neither is the aggregate of these sums, nor a quotient resulting from a division of the aggregate by twelve, the result of chance, but, on the contrary, the result of the most accurate of the sciences. Thus, from the commencement to the end of the process, no quantity which enters into the final result is determined by a resort to chance." (*Turner v. Tuolumne County Water Co.*, 25 Cal. 403.) But this case has received by no means a cordial approval by text-writers and other courts. Thompson & Merriam on Juries refers to the case, and the language which we have just cited, and says: "This reasoning seems hardly conclusive. It proceeds upon the hypothesis that at the time the jurors consent to be bound by the result of the addition and division it is certain that each juror will mark down his estimate of the damages; hence this process of finding a verdict is as exact as the science of mathematics. But the contrary is the fact. The jurors consent that their verdict shall vary from abstract justice in that degree that each juror deviates from sound judgment. All the prejudices, whims, and caprices which sway a

juror in his deliberations are given full play, and they measurably affect the final result. Nothing could well be more the sport of chance than a conclusion reached in this manner." (Thompson & Merriam on Juries, § 415. See, also, *Warner v. Robinson*, 1 Root, 195; 1 Am. Dea. 38; *City of Pekin v. Winkel*, 77 Ill. 56, 58; *Parham v. Harney*, 6 Smedes & M. 55.)

The California case also receives a severe criticism in *Goodman v. Cody*, 1 Wash. (Ter.) 329, 34 Am. Rep. 808. We cite from that case as follows:

"Among all the cases that have been cited in favor of and against the verdict in the case at bar being considered one got by chance determination we find none in which the meaning of the word 'chance' is discussed, and all the cases, in this respect, are unsatisfactory. The word 'chance' has not been adopted or defined as a law term, is not technical, and must be deemed used by the legislature in a popular sense. According to generally accepted and ordinary uses of the word, any thing is said to have happened by chance to any one which was neither understandingly brought about by his act nor pre-estimated by his understanding. If any one move his arm inconsiderately, and by the movement unintentionally break a crystal vase, we say he did it by chance; for his intelligence did not, from step to step, estimate or direct the action to its result. Yet, although the result was a chance one, it was the certain, inevitable result of assured relative positions of the arm and the vase, and the muscular action, perhaps voluntary, of the former. Again, when a die is thrown, the position in which the die will fall is a necessary effect from well-known but unestimated causes. By the original position of the die, its size, form, and weight, the manipulation given it, the distance and velocity of the throw, the sort of surface it falls upon, and perhaps other things, the final position of the die is determined with mathematical certainty, and may, by any painstaking mathematician possessed of the elements of the problem, by the use of 'the most accurate of the sciences,' be calculated with infallible precision. Still we may say, and properly say, that the final position of the die is determined by chance; and by this we mean, not that the result of the throw was uncertain, or a consequence of unknown causes, but that it was produced by causes the effi-

cient and proportionate operation of which were in fact by the person to whom it chanced neither estimated nor intelligently controlled for the accomplishment of the result. With the same propriety we speak of meeting by chance a person at a certain place at a certain time; and this, no matter how exactly we have precalculated and intended being ourselves at that place at the particular time, nor how exactly that person may have precalculated and intended being himself at the same place at the same time likewise, provided we to whom the chance happens, did not precalculate nor consciously bring about the meeting then and there.

From the popular use of the word 'chance' as illustrated in these examples it seems plain to us that a juror resorts to the determination of chance for a verdict whenever he resorts to any method of determination the steps and results of which are beyond his calculation, and unfollowed and unparticipated in by his understanding; and all the jurors resort to such a method when they resort to the method of average. With a verdict got, fairly as between the jurors, by such a method, the conclusion attained by the intelligence of any one juror never coincides, unless the average of the conclusions of all the jurors happens to be identical with his own; whereas, in a good verdict, every element of chance is eliminated by the fact that before the verdict is complete every intelligence on the jury, being first well apprised of the action of every other, has, by its own individual, conscious action, ratified and arrived at the same conclusion with every other. In a verdict got by the method of average every sum that goes to develop the verdict is a chance sum as to each juror, save the sum that the juror himself sets down; and the verdict is not redeemed from being a chance verdict as to each juror, and therefore chance as to all, by the fact that each has contributed to it an element not of chance, any more than a dice throw would be redeemed from being chance by the fact that the throw was in part controlled by certain intentional motion of the dice-box." (See, also, the note to this case by the editor of the American Reports. See, also, *Williams v. State*, 15 Lea, 129; 54 Am. Rep. 404; *Parham v. Harney*, 6 Smedes & M. 55; *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Flood v. McClure* (Idaho, Feb. 3, 1893), 32 Pac. Rep. 254.)

With due respect to the California court, from which this court for many years has drawn much that was useful and satisfactory, we cannot but hold that the cases which have repudiated *Turner v. Tuolumne County Water Co.*, 25 Cal. 397, state the better and more reasonable doctrine. Nothing occurs to us which would add force to the criticisms above cited of the California case. We therefore hold that such resort to the quotient process as is set forth in McNamara's affidavit is a resort to the determination of chance.

Since writing this opinion there have been published and come to our attention the cases of *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, and *Weinburg v. Somps*, Cal., June 9, 1893 (not reported), in which the California supreme court desert the doctrine of *Turner v. Tuolumne County Water Co.*, 25 Cal. 397.

The order granting the new trial in this case is affirmed.

Affirmed.

HARWOOD, J., concurs.

MISSOULA ELECTRIC LIGHT COMPANY, RESPONDENT, v. MORGAN, APPELLANT.

[Argued June 29, 1893. Decided October 3, 1893.]

JUSTICE OF THE PEACE—Appeal.—An appeal from a justice court, after a decision by the justice, brings the case into the district court, with all the original papers, for trial *de novo* on the merits, and therefore alleged errors in the rulings or action of the justice in the adjudication of the case are not reviewable on such appeal. (*State v. Evans, ante*, page 239, cited.)

APPEAL—Error in instruction.—Error in the giving or refusal of instructions will not be reviewed on appeal where the instructions are not made a part of the judgment-roll or incorporated in a statement or bill of exceptions.

FORCIBLE ENTRY AND UNLAWFUL DETAINER—Judgment, form of.—A judgment in an action for forcible entry and detainer for the restitution of the possession of the land and the recovery of three dollars, being treble its rental value, is in conformity with a verdict finding the defendant guilty and fining him one dollar, and further finding the monthly rental value of premises to be one dollar, there being special findings that plaintiff was in actual possession at the time defendant entered forcibly and detained possession.

Appeal from Fourth Judicial District, Missoula County.

Action for forcible entry and unlawful detainer. Judgment was rendered for the plaintiff below by WOODY, J. Affirmed.

H. D. Moore, for Appellant.

McConnell, Clayberg & Gunn, and *T. C. Marshall*, for Respondent.

HARWOOD, J.—This action was first prosecuted in the justice's court by plaintiff to obtain restitution of the possession of a certain piece of land in Missoula county, under the provisions of the statute forbidding forcible entry or unlawful detainer of lands in possession of another (Code Civ. Proc. §§ 716–33), and the trial in the justice's court resulted in findings and judgment in favor of plaintiff. The cause was then appealed to the district court of said county by defendant. In the district court another trial was had, before the court and a jury, which again resulted in findings and judgment in favor of plaintiff, from which latter judgment an appeal is prosecuted to this court by defendant.

The errors assigned and urged in this court by appellant relate: 1. To the rulings of the district court in refusing to grant defendant's motion "for a perpetual stay of proceedings in said action, on the ground that the judgment appealed from was rendered more than four days after the cause was submitted to the justice"; and 2. The order of the district court overruling appellant's motion to dismiss said action on the same grounds; 3. That the court erred in refusing to give the jury certain instructions tendered by defendant; 4. That the evidence is insufficient to justify the verdict; and 5. That the judgment entered in said case is not authorized by the verdict, in that the verdict is for restitution of the premises, as well as the rental thereof, while the verdict of the jury was only for the rental value of the premises.

The principal point relied on by appellant appears to be the assignment that the district court erred in overruling appellant's motion for "perpetual stay of proceedings," and his motion that the district court dismiss the action, on the ground that it appears from the justice's docket that the judgment by the justice of the peace was rendered on the fifth day after the submission of the cause, instead of within four days after such submission, as provided by statute. (Code Civ. Proc., § 794.) These motions were each predicated on the same grounds, and each practically sought the determination of the case by the

district court because of an error or irregularity committed by the justice of the peace in the adjudication before him. We have no doubt that appellant, in the district court, had a right to dismiss his appeal from the justice's court at any time before commencement of trial in the district court. The motions here under consideration, however, were not for dismissal of such appeal, but sought the dismissal of the cause by the district court, and thereby an annulment of the judgment of the justice's court, because of certain irregular action of the justice during his adjudication of the case.

Under our system, an appeal from the justice's court, after an adjudication and decision of the cause by the justice, raises the case into the district court, with all the original papers, for trial *de novo* on the merits. (Code Civ. Proc., §§ 730, 731, 822-26; *State v. Evans, ante*, p. 239.) There is no provision for the district court, upon such an appeal, to review certain rulings or action of the justice of the peace in the course of his adjudication and decision of the case, and on the correctness or incorrectness thereof determine the case in the district court. It is true that, if the justice had no jurisdiction of the parties or the subject matter of the action, the district court would dismiss or nonsuit the case, because, under those conditions, the district court would have no jurisdiction to try and determine the case. Many cases cited by appellant's counsel in support of his position relate to such conditions. But in the case at bar it appears, and is not disputed, that the justice had jurisdiction both of the subject of the action and of the parties thereto. When the adjudication was finished in the justice's court, and the decision recorded, the defendant carried the case into the district court by appeal for trial *de novo*, as provided by law; and in our opinion the district court committed no error in refusing to review the action of the justice of the peace, and determine the case on consideration thereof. Within certain limitations, such review may be had through *certiorari* proceedings.

It is manifest from an examination of the record that some of appellant's specifications of error cannot be reviewed on this appeal from the judgment. The record contains portions of the judgment-roll—that is, the complaint, answer, and judgment—to which is annexed a statement on appeal; but it is

disclosed by examination of the statement on appeal that it does not include the instructions given to the jury, or those tendered by defendant and rejected by the court. It is true there is bound in the record here what purports to be copies of the instructions given by the court to the jury in the case, but these instructions are not part of the judgment-roll (Code Civ. Proc., § 306), and, not having been incorporated in a statement or bill of exceptions, we are clearly not authorized to review them. (*Barber v. Briscoe*, 8 Mont. 214; *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461; *Kleinschmidt v. McDermott*, 12 Mont. 309.) It is observed that the record nowhere contains a copy of the instructions which were offered by the defendant and rejected by the court. Yet the statement contains specifications of alleged error committed by the court in refusing to give certain instructions. Therefore those specifications relating to the instructions are unavailing.

As to the assignment that the evidence is insufficient to sustain the verdict, this is not a matter subject to review in an appeal from the judgment alone, but pertains to motion for new trial. The contention that the judgment does not conform to the verdict of the jury is untenable. The jury rendered a general verdict as follows: "We, the jury in the above-entitled action, find the defendant guilty of a forcible entry and detainer of the premises in question, and fix his punishment therefor at a fine of one dollar; and further find that the monthly rental value of said premises during the time defendant had been in possession of the same to be one dollar per month." And, in addition thereto, special findings that plaintiff was in the actual possession of the land at the time of the defendant's entry, and that defendant entered forcibly, and detained possession of said land.

The judgment provides for the restitution of the possession of said land, and recovery from defendant of three dollars, being treble the amount of the rental value of the premises found by the jury, and one dollar fine, together with costs and disbursements. This recovery is in conformity to the law under the findings of the jury. The judgment of the district court will therefore be affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

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STATE, APPELLANT, v. DESLAURIES, RESPONDENT.

[Submitted June 29, 1893.—Decided October 9, 1893.]

APPEAL FROM JUSTICE—Jurisdiction.—On appeal from justices' courts, both civil and criminal cases are tried in the district court *de novo*, and it is error for the latter court after rendering judgment in a case so appealed, to grant a motion in arrest of judgment made upon the ground that the justice had no jurisdiction to render the judgment appealed from. (*State v. Evans, ante*, page 239; *Missoula Electric Light Co. v. Morgan, ante*, page 394, cited.)

Appeal from Third Judicial District, Deer Lodge County.

Prosecution for costs. The cause was tried before DURFEE, J., who granted defendant's motion in arrest of judgment. Reversed.

Statement of the case by the justice delivering the opinion.

This is an appeal by the state from the order of the district court arresting judgment rendered for costs against a complaining witness in a prosecution for a misdemeanor. (Crim. Pr. Act, § 394.) The case originally was *State v. Slaughter*, for petit larceny, commenced and tried in the justice's court. The jury in the justice's court gave the following verdict: "We, the jury, find for the defendant, and recommend that the costs be taxed to the complaining witness." Judgment was thereupon entered in that court against the complaining witness, Deslauries, for costs. He appealed to the district court. Trial was had before a jury, who found the following verdict: "We, the jury, find there was no probable cause for commencing the prosecution in the above-entitled action, and that such was malicious." The complaining witness, Deslauries, in the district court, moved for arrest of the judgment on the following ground: "Justice court had no jurisdiction to enter judgment against the complaining witness on the verdict of a jury; hence the judgment was void." The ground of the motion in the district court was that the verdict in the justice's court did not find that the prosecution was not without probable cause, or malicious, and that, therefore, the justice's judgment was without jurisdiction. The district court sustained the motion of Deslauries, and ordered that no judgment be entered against him. The state appeals.

Henri J. Haskell, and Ella L. Knowles, for the State, Appellant.

Timothy O'Leary, for Respondent.

DE WITT, J.—It is our opinion that the district court erred in granting the motion in arrest of judgment. The same point is here presented as was decided in *State v. Evans, ante*, page 239, and *Electric Light Co. v. Morgan, ante*, page 394.

Respondent here was appellant in the district court. He appealed from the justice's court to the district court. On such appeal the trial in the district court is *de novo*, whether the case is civil (*cases supra*) or criminal. (Crim. Pr. Act, § 516.) It may be said in this case as in *Electric Light Co. v. Morgan*: “There is no provision for the district court, upon such an appeal, to review certain rulings or actions of the justice of the peace in the course of his adjudication and decision of the case, and on the correctness or incorrectness thereof determine the case in the district court.”

The judgment of the district court is reversed, and the case remanded, with directions to the district court to enter a judgment on the verdict in the district court for costs against the complaining witness.

Reversed.

HARWOOD, J., concurs.

PEMBERTON, C. J., did not participate in the hearing or determination of this case.

STATE, RESPONDENT, v. ESCHBACH, APPELLANT.

[Submitted October 8, 1898. Decided October 9, 1898.]

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CRIMINAL LAW—*Assault with deadly weapon.*—A conviction in a prosecution under section 60 of the Criminal Laws, making an assault with a deadly weapon a felony, when made with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, can be followed only by punishment for misdemeanor where the jury found the defendant guilty “of an assault with a deadly weapon,” as such verdict lacks the elements required to constitute the felony.

Appeal from Eighth Judicial District, Cascade County.

Conviction for assault. Defendant was tried before BENTON, J. Reversed, and judgment directed.

Statement of the case by the justice delivering the opinion.

The defendant in this case was tried upon an information based upon section 60 of the Criminal Laws, which is as follows: "An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to imprisonment in the state's prison not less than one year nor more than two years, or to a fine not less than five hundred nor more than one thousand dollars, or to both such fine and imprisonment, at the discretion of the court." The jury returned a verdict in the following language: "We, the jury in the above-entitled cause, find the defendant guilty of an assault with a deadly weapon." Upon this verdict defendant was sentenced to imprisonment in the penitentiary for the term of two years. Upon the appeal, the appellant contends that he was sentenced for a felony, as described in section 60 of the Criminal Laws, whereas the jury found him guilty of only an assault, which is a misdemeanor, as described in section 58 of the Criminal Laws, which is as follows: "An assault is an unlawful attempt, coupled with a present ability to commit a violent injury upon the person of another, and every person convicted thereof shall be fined in a sum not less than five nor more than fifty dollars."

F. C. Park, and H. H. Ewing, for Appellant.

DE WITT, J.—It is observed that there are several elements constituting the offense described in section 60 of the Criminal Laws. Those elements are: 1. An assault; 2. That it is with a deadly weapon; 3. That it is with the intent to inflict upon the person of another a bodily injury; 4a. Either where no considerable provocation appears, or 4 b; Where the circumstances of the assault show an abandoned and malignant heart.

The information charged all the elements of the offense.

There were two counts. The first count charged the offense with the element as noted above under 4 a, and the second

count charged the offense with the element as noted above under 4 b. The verdict of the jury found the defendant guilty of an assault with a deadly weapon. The verdict thus found element 1, and element 2, as above noted. It did not find the intent to inflict upon the person of another a bodily injury; nor did it find either that there was no considerable provocation, or that the circumstances of the assault showed an abandoned or malignant heart. It is clear that the jury did not find the defendant guilty of felony, because they omitted to find the elements required to constitute the felony. The verdict found simply an assault, and it found that that assault was made with a deadly weapon. (See *State v. Carroll*, *ante*, p. 246; *Territory v. Willard*, 8 Mont. 328; *Territory v. Stocker*, 9 Mont. 6.)

The judgment being for a felony, upon a verdict which found only a misdemeanor, the judgment must be reversed, and the case remanded, and with directions to the district court to assess a penalty upon the verdict for an assault, as provided in section 58, Criminal Laws; and, if a fine is enforced by imprisonment, then the imprisonment already undergone by defendant shall apply in satisfaction of such confinement, as far as it satisfies the same.

Reversed.

HARWOOD, J., concurs. PEMBERTON, C. J., did not participate in the hearing or determination of this case.

WILLIAM MERCANTILE COMPANY, APPELLANT, v.
FUSSY, RESPONDENT.

[Submitted October 8, 1898. Decided October, 9, 1898.]

NONSUIT—Appeal.—Error in nonsuit may be reviewed by a statement on appeal. (*McKay v. Montana Union Ry. Co.*, *ante*, p. 15, cited.)

APPEAL—Jurisdiction to settle statements.—The filing of a notice and undertaking on appeal stays the proceedings of the trial court upon the judgment or order appealed from, but does not divest the court of power to settle and certify such statements as are required to present matters of law or fact to the appellate court.

Appeal from Fourth Judicial District, Missoula County.

On motion to strike from the transcript the statement on appeal. Motion denied.

Duis & Crouch, and Thomas H. Carter, for Appellant.

Bickford, Stiff & Hershey, for Respondent.

HARWOOD, J.—The present consideration in this case relates to a motion interposed by respondent's counsel to eliminate from the record the statement on appeal on the grounds: 1. That no motion for new trial was made in the court below by appellant; and 2. That the statement on appeal was settled and certified by the judge of the trial court after the notice of appeal had been served, and such notice with undertaking on appeal had been filed. The action was brought to enforce payment of an alleged debt. At the trial, when plaintiff rested in the introduction of testimony, defendant moved the court for nonsuit, on the ground that sufficient proof had not been offered by plaintiff to sustain the material allegations of his complaint, which motion, after argument and consideration by the court was granted, and judgment entered accordingly in favor of defendant for his costs. From that judgment plaintiff appealed. The record filed in this court contains portions of the judgment-roll pertinent to the review desired, and also a statement on appeal containing the motion for nonsuit, a statement of the evidence offered by plaintiff, and specifications of alleged error of the trial court in sustaining defendant's motion for nonsuit.

1. The first point urged by respondent's counsel as ground for striking out the statement on appeal implies that a review of an order granting a motion for nonsuit can only be had after motion for new trial has been presented to the trial court, and an appeal taken from the ruling thereon. We cannot sustain this objection. No cases are cited by respondent in support thereof, and this court has had occasion heretofore to examine the same question of practice, and find the authorities contrary to the contention of respondent. (*McKay v. Montana Union Ry. Co., ante*, p. 15.)

2. Nor do we find reason or authority for sustaining the second proposition urged by respondent—that the statement on appeal should be stricken from the record because the judge of the trial court certified and settled it after the notice and undertaking on appeal had been served and filed. Respondent's counsel contend that thereby the trial court lost jurisdiction of the case, and therefore the act of settling and certifying the statement on appeal was void. Where proper undertaking on appeal to stay proceedings has been given, the appeal stays proceedings of the trial court "upon the judgment or order appealed from" (Code Civ. Proc., § 428); but does not divest the trial court of power to settle and certify such statements as are provided in the law of practice to present the matters of law and fact to the appellate court for review, provided, of course, that the same are prepared, settled, and certified within the time prescribed by law. (*Territory v. Fallis*, 2 Mont. 236; *Flynn v. Cottle*, 47 Cal. 526; *The Latona v. McAllep*, 3 Wash. (Ter.) 332.)

Therefore, an order will be entered overruling respondent's motion herein.

Motion overruled.

DE WITT, J., concurs. PEMBERTON, C. J., being absent, did not pass upon these questions.

STATE EX REL. CARTER, v. VOTAW.

[Argued October 8, 1893. Decided October 9, 1893.]

FORCIBLE ENTRY AND UNLAWFUL DETAINER—Justice of the peace—Jurisdiction.—A justice of the peace has jurisdiction of an action by a landlord against a tenant holding after default in payment of rent both under the forcible entry and unlawful detainer act (Code of Civil Procedure, § 718 et seq.), and by virtue of section 21, article VIII, of the constitution, clothing such courts with concurrent jurisdiction with the district courts in cases of forcible entry and unlawful detainer.

SAME—Landlord and tenant—Administrator.—The rule that a tenant cannot dispute his landlord's title may be invoked by the administrator of a deceased landlord under section 727, Code of Civil Procedure, authorizing the heirs, executors, administrators, assigns, agent, or attorney of the lessor to proceed against the tenant on a breach of the lease the same as the lessor might have done.

SAME—Pleadings.—In an action for the possession of leased premises against a tenant holding over after default in rent, judgment may be rendered on the pleadings for the plaintiff when the tenant's answer admits having leased the premises from plaintiff's intestate, and being in default for rent, although he may have denied plaintiff's right of possession.

Original proceeding. Application for writ of *certiorari*. Judgment for respondent.

Statement of the case by the justice delivering the opinion.

This is an application for a writ of *certiorari* against the justice of the peace to review his action in giving judgment on the pleadings in the case of H. J. Simons, administrator of the estate of A. O. Simons, against J. A. Carter, the relator herein. That action in the justice's court sought to obtain, under the provisions of the forcible entry and unlawful detainer act (Code Civ. Proc., § 716 et seq.), possession of a dwelling-house in the city of Helena. The complaint sets forth a cause of action against defendant, as a tenant holding after default in payment of rent and after demand for possession. Answer was filed. Upon complaint and answer the court rendered judgment upon the pleadings in favor of plaintiff, and thereupon a writ of restitution issued. Defendant in the justice's case now on this writ of *certiorari* contends that the justice's judgment is void, as being in excess of jurisdiction, and that the defendant therein has no appeal.

J. A. Carter, for Relator.

Albert I. Loeb, for Respondent.

DE WITT, J.—Relator contends that a justice's court has not jurisdiction, under the forcible entry and unlawful detainer act (Code Civ. Proc., § 716 et seq.), of an action by a landlord against a tenant holding after default in payment of rent. Const., art. 8., § 21, as to jurisdiction of justices' courts, provides, *inter alia*, that they "shall also have concurrent jurisdiction with the district courts, in cases of forcible entry and unlawful detainer." We are of opinion that this leaves the jurisdiction of these cases in the justice's court as provided in the statute. (Code Civ. Proc., § 716 et seq.)

Relator contends that the rule as to the tenant not disputing

the landlord's title does not apply to such a landlord as the plaintiff in the case under review, who was an administrator of the estate of the deceased landlord who leased to relator. He relies upon *Reay v. Cotter*, 29 Cal. 169. But section 727, Code of Civil Procedure, concludes that contention, which section, and section 37 *supra*, leave relator subject to the estoppel of the relation of landlord and tenant.

Relator contends that, in his answer, he denies the allegations by which plaintiff sets forth his right of possession of the real estate in question, and that hence the justice was without jurisdiction to enter, without a trial, the judgment for restitution. Indeed, this allegation in his affidavit moved this court to grant the writ. It is true that the answer does deny plaintiff's right of possession, but such denial, besides being in the nature of a conclusion of law, loses all force in face of the admissions of the answer. It is admitted by the answer that defendant leased the premises from plaintiff's intestate, and that, as such tenant, he is indebted and in default for seven months' rent. He thus concedes himself to be a tenant holding over after default in payment of rent. The judgment on the pleadings was therefore correct.

After an extended and patient hearing, the court asked relator, who appeared in person, what issues there were in the pleadings before the justice, upon which he claimed evidence could have been introduced which would have added any thing to the facts pleaded and conceded. The relator was unable to point out to us any such needed evidence, and our own investigation has discovered none. We are therefore of opinion that upon this review no reason has been shown why we should annul or modify the proceedings of the justice.

The case is therefore remanded to the justice's court at the costs of relator.

Writ denied.

HARWOOD, J., concurs. PEMBERTON, C. J., did not sit in the hearing or determination of this case.

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HAGGIN, RESPONDENT, *v.* LORENTZ ET AL., APPELLANTS.

[Argued April 10, 1893. Decided October 16, 1893.]

JUDGMENT—Default—Motion to vacate.—It is not an abuse of discretion to refuse to open a default when it appears that defendant's counsel was present in court when his motion to strike out was denied, and an order made to answer in ten days; where such counsel asserted that, after filing such motion he had no further notice of the proceedings, or of any action of the court in said cause for more than a month after the judgment was rendered; that for several months prior to the rendition of the judgment, and at the time thereof, he was ill, and during such time had an understanding with all attorneys practicing at that bar that none of his cases should be set for trial without notice to him, or until other counsel could be employed, in which arrangement he believed plaintiff's attorney was included, but which plaintiff's attorney denied, there having been ample time for the substitution of counsel had it been necessary, and it not appearing that defendant's counsel was not so far disabled as to prevent his being about to a considerable extent during the period mentioned, and counseling with defendant.

EJECTMENT—Damages—Pleading.—A general allegation in a complaint that plaintiff has suffered damage in the sum of five hundred dollars, by reason of defendant's wrongful ouster and withholding possession, will admit evidence of some damage, and an objection that the complaint is insufficient to sustain a judgment for damages, will not be sustained on appeal where the judgment-roll alone is before the court for review, and there is nothing from which the court can judge whether the proof received was germane to the allegation and the damages provable thereunder.

Appeal from Third Judicial District, Deer Lodge County.

Ejectment. Plaintiff had judgment below on default. Defendant's motion to open default was denied by DURFEE, J. Affirmed.

Statement of the case by Mr. Justice HARWOOD.

This case stands for review on appeal from the judgment, and from an order entered after judgment overruling appellants' motion to set aside and vacate the judgment and open the default therein entered against defendants.

The action is in the nature of ejectment to recover possession of a certain piece of land, particularly described, situate in Deer Lodge county, of which plaintiff avers ownership in fee since June 27, 1885, and that he is entitled to the possession thereof; that the defendants are now, and have been since September 1, 1888, wrongfully in possession and withholding the same from plaintiff, to his damage in the sum of five hun-

dred dollars. The complaint was filed September 27, 1890, and refiled, as amended, November 8, 1890.

The record shows that defendants appeared and filed demurrer to the complaint November 19, 1890, on the alleged ground that the complaint fails to state facts sufficient to constitute a cause of action. This demurrer appears to have been overruled January 19, 1891. The next move of defendants was on January 21, 1891, when they filed a motion to strike out certain designated portions of the amended complaint, which motion was overruled on September 28, 1891, during the September term of trial court; whereupon defendants were granted "up to and including October 8th to file answer." Thereafter, on October 17th, during the session of the trial court, no answer having been filed, on motion of plaintiff's counsel default of defendants and each of them was duly entered, and thereupon, after hearing testimony as to alleged damages for withholding possession of said premises, judgment was entered against defendants for recovery of possession of said premises, together with five hundred dollars damages for wrongful withholding thereof, and costs of suit. This judgment appears to have been rendered and entered October 17, 1891. Thereafter, on February 27, 1892, defendant Lorenz moved the trial court to set aside said judgment and open the default entered against him, accompanying said motion with his separate answer to the complaint, together with affidavits in support of said motion, the substance of which affidavits will be discussed in the opinion following. Respondent opposed said motion, and filed certain affidavits in opposition thereto. The motion was overruled.

Brantly & Scharnikow, for Appellant. •

I. When a party applies promptly for relief after he has notice of the judgment, and has not been guilty of gross laches, and his affidavits and answer present a meritorious defense, the court should not hesitate to set aside a default and allow him to file his answer. (*Haggerty v. Walker*, 21 Neb. 596; *Griewold Linseed Oil Co. v. Lee*, 1 S. D. 531; 36 Am. St. Rep. 761; *Taylor v. Trumbull*, 32 Neb. 508; *Buell v. Emerich*, 85 Cal. 116; *Malone v. Big Flat G. Min. Co.*, 93 Cal. 384; *Reidy*

v. Scott, 53 Cal. 69.) The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment upon the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion, it is better, as a general rule, that the doubt should be resolved in favor of the application. (*Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 20; *Cameron v. Carroll*, 67 Cal. 500; *Dougherty v. Nevada Bank*, 68 Cal. 275.) A party should not be allowed to take advantage of another's mistake or inadvertence so as to deprive him of a trial on the merits, especially when he relies upon a stipulation by which he failed to prevent a default; and this, whether there was actually such a stipulation or not, if the default was entered because of such reliance. (*Johnson v. Sweeney*, 95 Cal. 304.)

II. The complaint is not sufficient to sustain the judgment for the reason that there is no allegation of ownership at the time the suit was brought.

The allegation that a good and sufficient deed was executed to plaintiff in 1885 is not a sufficient allegation of ownership in 1888, the date of alleged ouster.

The allegation that "plaintiff has been, and yet is, entitled to the sole and exclusive possession and enjoyment of," etc., is a legal conclusion and not an allegation of a fact. (*Meyendorf v. Frohner*, 3 Mont. 323; *Payne v. Treadwell*, 16 Cal. 221.)

III. Plaintiff cannot recover any but nominal damages, no allegation for rents and profits having been made. (*Payne v. Treadwell*, 16 Cal. 221; Sedgwick and Waite on Trial of Title to Land, §§ 61, 454 and 653, and cases cited.)

Judgment for damages is not sustained by the complaint, for the reason that there is no allegation that plaintiff is owner, or ever was in possession. (Sedgwick and Waite on Trial of Title to Land, § 454; *Garner v. McCullough*, 48 Mo. 318.)

George B. Winston, for Respondent.

I. In making the order refusing to set aside the judgment, the court below was only required to exercise proper discretion, and the order must be so plainly erroneous as to amount to an abuse of discretion to justify interference on the part of the appellate court. (*Bailey v. Taaffe*, 29 Cal. 422; *Coleman v.*

Rankin, 37 Cal. 247; *Elmer v. Mitchell*, 75 Wis. 358; *Mulholland v. Heyneman*, 19 Cal. 605; *White v. Northwest Stage Co.*, 5 Or. 99.)

Neglect of attorney is neglect of client. (*Spaulding v. Thompson*, 12 Ind. 477; 74 Am. Dec. 221; Freeman on Judgments, 3d ed., § 112.)

II. Allegations of time as to seisin, ownership, or ouster, are immaterial. (*Salmon v. Symonds*, 24 Cal. 260; *Kidder v. Stevens*, 60 Cal. 414.)

The possession follows the legal title. (*Davis v. Clark*, 2 Mont. 394; *Lamme v. Dodson*, 4 Mont. 587.)

III. Under the allegation of damages in the complaint, plaintiff could recover damages for withholding the property, and for any damage to the property, and any damage other than for rents and profits. (Code Civ. Proc., § 86, div. 1, Comp. Stats; *Martin v. Durand*, 63 Cal. 39.)

HARWOOD, J.—This court is unable to find in the affidavits filed in support of the motion to set aside default a showing of facts sufficient to warrant a reversal of the ruling of the trial court thereon. The action was pending more than a year before judgment was entered. Defendants' demurrer having been overruled, their counsel interposed a motion to strike out certain portions of the complaint, which motion was overruled; whereupon defendants were granted ten days within which to file an answer. When that order was made, as appears from the affidavit of respondent's counsel, one of the appellants' attorneys was present within the bar of the court; and this is not directly disputed by the affidavits filed in support of the motion to set aside said default, although defendants' counsel affirms in his affidavit "that, after filing said motion to strike out portions of the complaint, affiant had no further notice of the proceedings in said cause, and did not know of the action of the court in overruling said motion, nor any action of the court in said cause, for more than a month after the rendition of the judgment therein."

There is no law or rule of practice requiring the court or plaintiff's counsel to notify defendant or his counsel of each proceeding in an action during the course of its adjudication

after defendant has been served with summons or appeared therein; and in this particular case defendant cannot complain if he and his counsel failed to keep themselves informed of the proceedings in said action as the same lawfully and regularly progressed, unless there was some special stipulation disregarded or violated, whereby defendant or his counsel was misled, which is not shown in this case.

Defendants' counsel affirms, in his affidavit in support of the motion to open said default, that some time during the month of April, 1891, he became sick, so that he could not attend to business; that said disability continued during the summer and autumn months of that year; that during the time of his illness affiant had a general understanding with all the attorneys practicing at said court that none of the causes in which he was employed as attorney would be set for trial without notice to him, or until other counsel could be employed by the client represented by affiant; "and that he believes plaintiff's attorney was included" in such understanding. There is no positive assertion in this affidavit, or any other filed in support of the motion to open said default, that such an arrangement had been entered into by plaintiff's counsel; and plaintiff's counsel positively denies in an affidavit that such stipulation or arrangement was ever sought from him or entered into by him.

In view of this showing, we think the court was justified in disregarding the alleged stipulation or agreement as an unauthorized assumption, which was evidently the view taken of it by the trial court in overruling the motion to open the default. It appears from his affidavit that defendants' counsel was not so far disabled as to prevent his being about to a considerable extent during the period mentioned, and that he counseled with his client about this case; and it is clearly shown that, even in the absence of a stipulation, ample time was given for substitution of counsel if defendants' counsel, after so long delay, was unable to represent him therein. Considering all the circumstances, we find no abuse of discretion in the order of the trial court denying appellants' motion to set aside the default entered against them.

Appellants urge the further point that the complaint is

insufficient to sustain the judgment for damages entered against them. This point cannot be sustained. It is true the complaint contains only a general allegation, to the effect that plaintiff has suffered damage in the sum of five hundred dollars, by reason of the wrongful ouster and withholding possession of said premises by defendants during the time alleged. Under such general allegation some damage may be proved, and on this appeal from the judgment, with the judgment-roll, only, upon review, we are not in possession of any showing whereby we can judge whether the proof received was germane to the allegation and the elements of damage which may be proved thereunder. (Code Civ. Proc., § 86; 3 Sutherland on Damages, § 991; Boone on Code Pleading, § 184; *Dimick v. Campbell*, 31 Cal. 239; *Miller v. Myles*, 46 Cal. 536; *Martin v. Durand*, 63 Cal. 39.)

The judgment must therefore be affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

KELLY, APPELLANT, v. CABLE COMPANY, RESPONDENT.

[Argued, February 6, 1898. Decided, October 16, 1898.]

NEGLIGENCE—Fellow-servants—Instructions.—In an action for personal injuries by an employee against a mining company, where it appeared that plaintiff was injured by an explosion, which occurred while he was at work in clearing up the debris from exploded blasts which had been fired by his fellow-servants, having knowledge that two blasts put in at the same time had not exploded, and it being shown on the trial to be the duty of plaintiff and his fellow-servants to see that every blast exploded, and the evidence being conflicting as to whether this was the foreman's duty, it is proper to instruct the jury that one of the risks which a servant takes upon himself is the negligence of his fellow-servants in the same common employment, and if the injury was occasioned by the negligence of the men engaged in blasting, who, in law, were plaintiff's fellow-servants, and defendant had no reason to believe such men incompetent or careless, then the verdict should be for defendant unless it was the duty of the foreman to superintend the blasting and warn plaintiff of unexploded blasts.

SAME—Instructions—Pleading.—An instruction that plaintiff did not claim that defendant's employees were incompetent is proper when the complaint only charged that they were negligent and careless.

Appeal from Third Judicial District, Deer Lodge County.

Action for personal injuries. The cause was tried before DURFEE, J. Defendant had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

The pleadings and contentions in this case are so fully set forth in the reports of the case on the former appeals that it is not now necessary to do more than refer to those reports. (7 Mont. 70; 8 Mont. 440.) What little distinction there is between the case as now and then before the court is noted in the opinion below. Upon this—the third—trial of the case, verdict and judgment were for the defendant. A motion for a new trial by plaintiff was denied, and from that order, and from the judgment, the plaintiff appeals. In appellant's brief and argument he complains of instructions Nos. 3 and 21, and that portion of instruction No. 1 where the court says as follows: "It is not claimed by the plaintiff that the foreman or any of the agents or employees of defendant were incompetent." Instructions 3 and 21 are as follows: "3. Defendant also claims that the injury to plaintiff was not occasioned by any negligence of defendant, or of its foreman or agents, but by the negligence, if there was any, of the men who were engaged in blasting, and who were fellow-servants of plaintiff, and for whose negligence defendant is not liable. Defendant also claims that the accident by which plaintiff was injured was one incident to the employment in which he was engaged, and arose from a peril which plaintiff assumed from his employment, and which defendant could not, by any usual or reasonable means, guard him against." "21. One of the risks which a servant takes upon himself is the negligence of his fellow-servants in the same common employment; and in this case the men who were engaged in blasting in the Cable mine were in law fellow-servants with the plaintiff, engaged in the same common employment of knocking down and removing the ore from the said mine. If the jury find from the evidence that the injury to plaintiff was not occasioned by the negligence of the defendant, but by the negligence of the men engaged in blasting, in failing to ascertain whether or not there was a missed charge, and that defendant had no reason to believe that such men were incompetent or careless, or that

they had failed to perform their duty in this respect, then the jury will find for defendant, unless you find from the evidence that it was the duty of the foreman of the Cable mine to superintend the blasting, and see that all the blasts had exploded, and to warn the plaintiff of the same."

F. W. Cole, and William Scallan, for Appellant.

W. W. Dixon, and Forbis & Forbis, for Respondent.

DE WITT, J.—As to instruction 21, it is to be observed that the testimony on this trial differed in some respects from that on the trial which resulted in the appeal reported in 7 Mont. 70. The record in this court on that appeal showed that Savery, the superintendent, testified that he instructed Showers, the foreman, "that as an extra precaution I wanted him at every blast, if possible, to be present to direct the men, and after the explosion to see that every hole had exploded." This court on the first appeal took the view, apparently, that the superintendent instructed the foreman, and that it was the foreman's duty to be personally present at every blast, and to personally oversee it. It was with this view, doubtless, that this court said on that appeal: "The instructions asked by the plaintiff virtually exclude the defense of the negligence of a fellow-servant from the consideration of the jury, and this view of the matter at issue seems to be borne out by the evidence." As we understand that opinion, the court considered that the defense of the negligence of fellow-servants was out of the case, for the reason that the evidence was that it was the foreman's duty to be personally present at every blast. Now, on the third trial, which resulted in this present appeal, Savery, the superintendent, testified: "I never gave Showers any such absurd instructions as to be present, if possible, at the discharge of every blast, and I never testified before to any such thing. I cannot recollect that I testified before that I had given Harvey Showers instructions, as an extra precaution, to be present at every blast." In this testimony Savery was contradicted by the stenographer who took the testimony on the first trial. The stenographer testified that Savery's evidence on the first trial, as to this point, was as above noted. This

conflict between Savery and the stenographer went to the jury for their solution. Therefore there was evidence on this trial, as it seems there was not on the first trial, that the foreman was not instructed to be present at every blast. Savery testified on this trial: "I don't think it is possible that I ever gave Showers instructions, as an extra precaution, to be present at every shot, and see if it had been discharged, nor did I ever testify that I had done so. It is the duty of the foreman to oversee all the blasting, but not to the extent of informing himself as to what each man was doing." Furthermore, on this trial the testimony was that it was the duty of miners to see that the shots all exploded, and that the method of ascertaining this fact was to count the reports when the explosion took place. A witness, Owen McBride, testified that he was a miner, working, on the day of the accident, in the crosscut where Kelly was injured. He put in the holes, loaded, and fired them. He said that, when he counted the reports, there were two reports short. He waited some little time, went in and examined, found the ground all broken, and could see no missed holes. The smoke was thick, and he could not see well. When he could look, he saw no signs of missed holes. This man was working on the day shift, and Kelly went on at night to clear up the debris from the day's work. This witness, McBride, says further: "I saw Kelly at supper-time, between the mill and the boarding-house. He asked me how I was getting along, and I said not good. I told him there were two reports short in the crosscut, but I had found the ground all broke, and couldn't see any missed holes." It also appeared in evidence that sometimes a piece of loose powder gets into the debris by being dropped, or coming from a "cut-out hole," and that such a piece could be exploded by the blow of a pick. Under this testimony, we are of the opinion that instruction 21 was appropriate on this trial, however true it may have been that there was no evidence on the first trial which would allow a jury to consider the defense of the negligence of a fellow-servant. We think that the evidence on this trial did not shut out the consideration of such defense. There was evidence that it was not the foreman's duty to be personally present at every blast. There was evidence, to be sure, tend-

ing to contradict the witness testifying on this point, but that evidence and its contradiction were all before the jury. There was also evidence that it was the duty of the men to see that the holes all exploded. There was evidence that one of the miners who was doing this blasting thought there might be two missed charges, and informed Kelly of this. Under these facts, instruction 21 fairly states the law of the defense of the negligence of fellow-servants. The closing paragraph of that instruction leaves it to the jury to find that the accident was due to the negligence of the foreman, who was a representative of the principal (the defendant).

The appellant complains of instruction No. 3, that it is a direct statement by the court that the men engaged in blasting were fellow-servants of the plaintiff, and that for their negligence the defendant is not liable. This construction of the court's language might be correct if those two or three lines upon that subject were taken out of the instruction and stood alone; but, with the whole instruction before us, it is clear that the court simply stated to the jury what the defendant claimed.

As to instruction No. 1, appellant contends that this "misstates plaintiff's position, in that it tells the jury that the plaintiff did not claim 'that the foreman, or any of the agents or employees of defendant, were incompetent'; whereas the evidence affirmatively shows that they were incompetent in the matter of examining for and discovering missed charges, and also that their manner of discharging blasts was incompetent, in that it tended to make it impossible, or very difficult, to discover missed charges." (Quoted from appellant's brief.)

In examining the complaint we do not find that there was any charge made that the foreman, agents, or employees were incompetent. It is charged that they were negligent and careless. Those terms are not convertible. The same observation is true of evidence. The effort of plaintiff was not to prove that the defendant's agents were incompetent, but rather that they were careless and negligent. If persons were careless and negligent, that is not proof that they were incompetent. A competent person may be careless; an incompetent person may, as far as his knowledge or skill goes, be careful. We are therefore of the opinion that there was no error in this instruction.

Having reviewed the errors claimed by appellant, we conclude that none of them can be sustained, and the judgment is therefore affirmed.

HARWOOD, J., concurs.

PEMBERTON, C. J., having been counsel in this case, did not participate in the hearing or determination thereof.

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STATE EX REL. GREENLAND v. DISTRICT COURT
OF SECOND JUDICIAL DISTRICT ET AL.

[Argued September 11, 1893. Decided October 16, 1893.]

RECEIVERS—Ejectment—District Court—Jurisdiction.—The district court has not jurisdiction in an action for recovery of the possession of real property, with rents and profits, and damages for withholding possession, to dispossess the defendant on the commencement of the action, and before trial and judgment through the appointment of a receiver, upon a mere showing that the property was mortgaged, and the defendant was insolvent, and was collecting the rents which plaintiff needed to pay the interest upon the mortgage debt.

Certiorari to review action of second judicial district court in appointing a receiver for relator's property. Order was made by McHATTON, J. Annullled.

Oliver M. Hall, for Relator.

Charles R. Leonard, for Respondent.

HARWOOD, J.—The matter for review herein is the appointment of a receiver by the court below, in an action in the nature of ejectment, to take and hold possession of the real estate in controversy, collect the rents and profits thereof, and dispose of the same, pursuant to the orders of court. That appointment, relator claims, is in excess of the court's jurisdiction in said action, and she therefore brings the proceeding up for review by *certiorari* to obtain relief therefrom. (*Bateman v. Superior Court*, 54 Cal. 285.)

It appears that in said action one Carl Earnest Leischke, plaintiff, seeks to recover from relator, Louise B. Greenland, possession of a certain parcel of real estate situate in the city of

Butte, this state. Immediately after filing complaint and service of summons, such proceedings were had as resulted in the appointment of a receiver to take and hold possession of the property in dispute, and manage the same, collect the rents thereof, pay expenses of management, and apply the remaining proceeds to the payment of encumbrances on said property, subject to the further orders of the court.

The complaint in said ejectment suit contains allegations in substance as follows: That on June 19, 1893, said plaintiff, Carl Ernest Leischke, was, and ever since has been, the owner, and entitled to the possession of, said premises, particularly describing the same; that on said date defendant, Louise B. Greenland, conveyed to plaintiff said premises by warranty deed, a copy of which deed is attached to the complaint as part thereof; that ever since said conveyance defendant has unlawfully and wrongfully withheld possession of said premises from plaintiff, to his damage in the sum of \$1,000; that the value of the rents and profits of said premises since June 19, 1893, while plaintiff has thus wrongfully excluded defendant therefrom, is \$400; that the improvement situated upon said premises is a two-story lodging-house, comprising twenty rooms, all of which rooms, except one occupied by defendant Greenland, are leased by her to tenants, and that the sum of about \$250 per month is realized therefrom, and that defendant appropriates such rents to her own use; that defendant is insolvent, and will be unable to refund any of the rents so collected by her while in the wrongful possession of said premises. And plaintiff further avers that said property is mortgaged to secure payment of the sum of \$7,000, bearing interest, by a mortgage executed and delivered by defendant while she owned said premises prior to such conveyance to plaintiff; that the interest on said mortgage becomes due and payable monthly, and said mortgage provides that, in case of default in payment of such interest as it becomes due, thereby the whole principal of said mortgage debt shall become due and payable; that defendant has neglected and refused to pay any interest on said mortgage since said conveyance of the property to plaintiff, and that said interest has been paid by plaintiff; that plaintiff is unable to continue the payment of such interest unless he receives the

rents and profits of said property: "That defendant, by collecting and appropriating to her own use said rents, is endangering the title to said property, and suffering the same to go to waste."

Upon these allegations plaintiff demands judgment against defendant: 1. For the recovery of the possession of said premises, and \$1,000 damages for wrongfully withholding possession thereof; and 2. For the sum of \$400, value of rents and profits thereof, and costs of suit; and further, that a receiver be appointed *pendente lite*, with full power and authority to enter upon and take possession of said premises, to take care of and rent the same, with power to demand and enforce the payment of rents pending this suit in such manner as may be deemed most advantageous to the parties interested therein, subject to the further orders of court.

In compliance with an order of court issued and served upon defendant Greenland, in said action, calling upon her to show cause, if any existed, why a receiver should not be appointed to take charge of said property as demanded in the complaint, she appeared and filed an affidavit of merits setting forth affirmations and denials in substance as follows: She denies that plaintiff is now, or was at any time, owner of said property. Denies that said property was conveyed to plaintiff on June 19, 1893, or at any time, by defendant, by warranty deed, or otherwise, but alleges the facts to be that on or about said date plaintiff negotiated with defendant for the purchase of said property; that, according to the terms of an oral agreement then made between said parties, plaintiff agreed to assume the mortgage of \$7,000 upon said premises, and to assume and pay certain insurance, and the interest then due on said mortgage, and certain other debts and obligations of defendant, not exceeding \$2,000, and also to execute and deliver to defendant two promissory notes, each for the payment of \$1,000 to defendant at the end of one and two years from said transaction, making a consideration of \$11,000 to be paid by plaintiff for said premises; "that, relying on said oral agreement with plaintiff, the defendant executed the deed mentioned in plaintiff's complaint, but alleges that said deed was never delivered by defendant to plaintiff, and that plaintiff secured possession

of said deed without defendant's consent, and that plaintiff refused to deliver to defendant said promissory notes, or to carry out or to fulfill his part of said oral agreement, further than was necessary to protect himself from third parties having claims against the said premises, and that any payment that may have been made by plaintiff was made without the consent of defendant herein; that defendant immediately demanded of the plaintiff the return to her of said deed, but that plaintiff refused to return said deed to defendant, but had the same recorded without defendant's consent, and that on the third day of August, 1893, defendant commenced an action against the plaintiff to have said deed canceled and declared a cloud upon defendant's title to said premises; and that said action is now pending in department two of this court."

Admits that defendant holds possession of said premises and withholds the same from plaintiff, but denies that said withholding is wrongful or unlawful, and specifically denies each allegation of damage set forth in the complaint; and further denies that said premises yielded \$400 in rents and profits from June 19, 1893, to the commencement of said action, "or any greater sum than \$92" was obtained from rent of furnished rooms of said building during that time; "and that said amount also included the services of defendant in taking care of, cleaning, and managing the rooms in said house; that on account of the interference with tenants by plaintiff, and threats made by him, certain tenants left said premises, and the rent therefor was thereby decreased; and that plaintiff has, without defendant's consent, and wrongfully, collected \$40 rent from defendant's tenants; and that said \$40 is included in the \$92 mentioned above."

Denies that all of the twenty rooms in said house save one, occupied by defendant, were leased to tenants, or yielded the amount of rent alleged by plaintiff, but, on the contrary, affirms that the rent of said rooms furnished, and "with the care and labor of defendant in taking care and cleaning the same, does not exceed \$132 per month." Denies insolvency of defendant, or that she will be unable to return the rents derived from said premises in case adjudged so to do on the final determination of the action. Admits that a mortgage exists on said

premises to secure payment of \$7,000, executed by defendant, bearing interest, payable quarterly (instead of monthly as alleged in the complaint); and says "that the last installment of said interest became due on August 11, 1893, and all interest previous to the last installment had been paid by defendant; and that it was not previously her custom to pay said interest exactly on the date it became due," but that the holders of said mortgage had always granted her an extension of time from one to two weeks, as it might suit her convenience, to pay said interest; and that she was making arrangements to pay said last installment of interest. Denies that she ever refused to pay said interest as the same became due. Denies that defendant, by collecting the rents from said property, is endangering the title thereof, or suffering the same to go to waste, "but alleges that in order to pay the interest upon said mortgage it is necessary for her to collect the rents and profits thereof.

And defendant further says that she resides in the said house, and runs and operates the same as a lodging-house, and that she takes care of and cleans the rooms rented to lodgers and roomers in said house; that in order to rent said house advantageously it is necessary that said house be furnished, and that there be some one to manage and attend to said house, and especially to the rooms on the upper floor; and unless said house is furnished, and in charge of some person who can attend thereto, affiant believes that it would be impossible to rent said house for a sufficient sum to pay the interest upon said mortgage.

And affiant further says that she has been, and now is, earning a livelihood attending to said house, and, if said house is placed in the hands of a receiver, that affiant will be compelled to remove her furniture therefrom, and to sell the same at a sacrifice or to pay storage thereon. And defendant alleges that if a receiver is appointed in this case she will be greatly and irreparably injured, and that her business will be destroyed. Wherefore defendant prays that a receiver be not appointed during the pendency of this action."

On the hearing of the motion for appointment of a receiver plaintiff testified in support thereof, relating the conditions of

his purchase of said property from relator, Mrs. Greenland, in effect contradicting her version of the transaction as set forth in her affidavit, and affirming his fulfillment of the transaction on his part; also testifying to the payment of certain sums by him which were charges on said property, claiming that he was compelled to make such payments to protect the property. Mrs. Greenland also submitted on said hearing affidavits by two persons in support of her version of the transaction. The facts have been narrated in the foregoing statement to show the full scope of the controversy involved. But the question for determination is whether or not the court has jurisdiction in such an action for recovery of the possession of real property, with rents and profits and damages for withholding, to dispossess the defendant on the commencement of the action, or before trial and judgment, through the appointment of a receiver.

Upon careful consideration of the allegations of the complaint we can find no equitable elements therein sufficient to bring the case within the equitable jurisdiction of the court, and warrant the appointment of a receiver to take possession of the property in controversy. The complaint, when carefully considered, presents nothing more than an action of ejectment, as formerly classified; that is, an action to recover possession of the real property in question, together with counts for damages for withholding possession and for rents and profits. (Code Civ. Proc., § 86.)

The complaint does not even present allegations showing waste (although plaintiff urges the matter of waste and danger of loss of said property as grounds for a receiver), because the fact alleged, that defendant is renting the rooms to tenants and collecting the rents, in no manner shows waste or injury to the premises. Nor are there other allegations showing any extraordinary circumstances of danger or equitable grounds of relief connected with the legal elements of the suit. Even if waste or danger of waste was shown, the usual remedy, and the one pointed out by statute therefor, is injunction. (Code Civ. Proc., § 86.) It has never been considered that allegations showing waste, or danger thereof, warranted the appointment of a receiver in ejectment actions. The old writ of

estrepelement at common law, now obsolete because injunction is used to effect the same purpose, did not dispossess the defendant, but forbade and prevented waste. (3 Blackstone's Commentaries, 225; Anderson's Law Dictionary, 417; 1 Bouvier's Law Dictionary, 609.)

Nor do the allegations as to plaintiff's need of the rents and profits of the property in controversy, to make proposed payments thereon, justify the dispossession of defendant by a receiver prior to judgment. In nearly all ejectment actions some such circumstances could be alleged. We have carefully examined all the authorities cited by respondent's counsel and others, and while some actions where recovery of possession of real property was sought have comprised such other and further grounds for equitable relief as to warrant the appointment of a receiver, this action does not come within that category. (*Baleman v. Superior Court*, 54 Cal. 285; *Scott v. Lumber Co.*, 67 Cal. 71; *Emerson's Appeal*, 95 Pa. St. 258; *Cofer v. Echerson*, 6 Iowa, 502.)

Respondent suggested an irregularity in entitling this proceeding as "*Louise B. Greenland v. Department No. 1 of the District Court of Silver Bow County*." The suggestion is pertinent and well taken. This point of practice was fully considered in *Chumasero v. Potts*, 2 Mont. 242, and *Territory v. Potts*, 3 Mont. 364, and the proper practice explained. There being no objection urged, but merely a suggestion in this regard, the title of these proceedings has been re-formed accordingly, as shown above. The fact that the respondent tribunal is a court presided over by two judges concurrently administering the functions of that court, and that they for convenience arrange their respective departments by number, does not divide such court into two tribunals, as implied in the original title of this proceeding. The case wherein the proceedings under review was had is lodged in said tribunal, and all judges presiding therein, whether permanently, or called to preside temporarily under the provisions of the law, are bound to take notice of this review and give effect to the result thereof. Hence it seems proper to address these proceedings to such tribunal and the judges presiding, without naming any particular judge.

The appointment of a receiver in this case not being warranted, the order to that effect made by the court below must be annulled, and the possession of the premises in question restored to relator; and the order of this court will be entered to that effect.

Order annulled.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE EX REL. SHANNON v. REYNOLDS.

[Argued, October 4, 1893. Decided, October 17, 1893.]

HABEAS CORPUS—Costs.—One who invokes the writ of *habeas corpus*, without meritorious cause, may be properly taxed with the costs of the proceedings under § 506 of the Code of Civil Procedure. (*State ex rel. Newell v. Newell, ante*, page 302, cited.)

On motion to retax costs in *habeas corpus* proceeding.
Denied.

J. W. Shannon, for relator.

Per CURIAM.—In this case relator sued out a writ of *habeas corpus* from this court. Upon hearing of that proceeding he was remanded to the custody from whence he was brought under the writ, and the costs of the proceeding were taxed against him. He now moves this court to reconsider the question of so assessing the costs against him, claiming that the taxation of costs against one invoking the writ of *habeas corpus* is not warranted in law, but he cites no cases whatever in support of that proposition.

Code of Civil Procedure, § 506, provides: “SEC. 506. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review in other way than by appeal, the same costs shall be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.”

This question was also thoroughly considered in *State v.*

Newell, ante, p. 302, reaching the conclusion that the law contemplates the taxation of costs against the party invoking the writ without meritorious cause.

Motion overruled.

HARWOOD and DE WITT, JJ., concur.

STATE, APPELLANT, v. NORTHRUP, RESPONDENT.

[Submitted October 23, 1893. Decided October 24, 1893.]

Costs—Appeal by state.—The clerk of the supreme court is not required to file the transcript on an appeal by the state in a criminal case without the payment, in advance, of the docket fee of ten dollars, required by the act of March 6, 1891, to be collected, in advance, from an appellant, and the county wherein the prosecution was had is chargeable with the payment thereof.

Appeal from Sixth Judicial District, Park County.

On motion of the attorney general for an order requiring the clerk of the supreme court to file the transcript in an appeal by the state without first receiving the fee therefor. Denied.

Henri J. Haskell, attorney general, H. J. Miller, and Allen R. Joy, for the motion.

Campbell & Stark, contra.

PER CURIAM.—In this case the attorney general moves this court for an order requiring the clerk to receive and file the appeal herein prosecuted by plaintiff without collecting the fee provided by section 2 of the act of March 6, 1891 (2 State Sess. Laws, p. 208.) That provision of the statute requires the clerk of this court to collect in advance from appellant a docket fee of ten dollars, on filing the transcript.

The various counties of this state are charged with the duty of prosecuting all criminal cases arising in their respective jurisdictions, and in such cases the law provides that the county wherein the prosecution is had shall pay the costs and expenses thereof; of course, subject, ultimately, to be collected from the defeated party.

This prosecution was instituted in Park county, and an appeal was taken by the prosecution. There is no doubt that said county is chargeable with the payment of the fees provided to be collected by the clerk of this court on filing the record. The attorney general points out section 517, Code of Civil Procedure, and insists that under that section no fees can be required, in advance, from those prosecuting this appeal. That section, so far as it applies to the collection of fees by the clerk of this court, is modified by the act of 1891, cited *supra*, which requires the clerk to collect said fees in advance. That requirement is made more imperative by section 3 of said act of 1891, which provides that the clerk shall charge himself with, and account for, the "full amount" of all such fees as are provided by section 2 of the same act to be collected by him, and pay the same into the state treasury. He is under bond so to do.

The order moved for is denied.

HARWOOD and DEWITT, JJ., concur.

IN RE FINKELSTEIN.

[Argued October 30, 1893. Decided November 2, 1893.]

CERTIORARI—Appealable order—Alimony—Contempt.—An order for payment of counsel fees and alimony in an action for divorce is an appealable order, and therefore *certiorari* will not lie to review the action of the lower court in committing defendant for contempt in refusing to obey such order.

SAME—Constitutional law—Alimony—Contempt.—The scope of the writ of *certiorari* is not so enlarged by section 8, article VIII, of the constitution, providing that "each of the justices of the supreme court may also issue and hear and determine writs of *certiorari* in proceedings for contempt in the district court," as to permit a review by this court of an order for the payment of alimony, where imprisonment for contempt is involved, notwithstanding relator had a remedy by appeal from such order. (*In re MacKnight*, 11 Mont. 182, 28 Am. St. Rep. 451, cited.)

Original proceeding. Application for writ of *Habeas corpus* and *certiorari* in aid thereof to review proceedings of district court, resulting in the commitment of relator for contempt in refusing to obey an order for the payment of alimony. Denied.

13	425
14	4
14	397
24*	847
24*	1060
36*	758
13	425
24	498
18	425
27	525
13	425
28	234
13	425
32	161

McConnell, Clayberg & Gunn, for Relator.

F. E. Stranahan, for Respondent.

HARWOOD, J.—In this proceeding, which comprises a writ of *habeas corpus* addressed to the sheriff of Lewis and Clarke county, together with a writ of *certiorari* addressed to the district court within and for said county, relator seeks a review of certain proceedings, and discharge from imprisonment imposed upon him by order of said court.

It appears that in an action for divorce and alimony instituted against relator by Eva Finkelstein, his alleged wife, such proceedings were had as resulted in an order of the district court requiring relator to pay fifty dollars for employment of counsel on behalf of plaintiff in said action for divorce, together with the sum of thirty dollars per month, temporary alimony, payable to plaintiff until otherwise ordered, and that on default of payment of said sum of thirty dollars, as ordered, such further proceedings were had in the district court in said matter as resulted in an order committing defendant to imprisonment in the county jail for contempt of court in disobeying said order for payment of temporary alimony. Thereupon he sued out of this court a writ of *habeas corpus*, accompanied by a writ of *certiorari*, to review said proceedings of the district court, whereby relator seeks to show that said order for imprisonment is in excess of the jurisdiction of the district court, on certain grounds urged, and upon such showing to obtain an order discharging relator from imprisonment, through the writ of *habeas corpus*.

Respondent's counsel answers all these propositions urged on behalf of relator by pointing out that an appeal lies from a judgment or order of the district court for payment of temporary alimony in said proceedings for divorce, and that therefore the same cannot be reviewed by *certiorari*, as that writ can only be invoked where there is no appeal, as provided by section 555, Code of Civil Procedure, as well as the general doctrine defining and designating the functions and use of the writ of *certiorari*. And respondents' counsel further insists that inasmuch as an appeal lies from said order, through such appeal, with the stay bond provided in such cases, relator would obtain

his instant and complete remedy against the enforcement of the order for temporary alimony by imprisonment or otherwise, and that therefore he must be remitted to that proceeding for review of the action of the district court, by an order of this court refusing to review said proceeding on *certiorari*, and remanding relator to custody.

That an appeal lies from the order for payment of temporary alimony in an action for divorce has been determined upon such sound principles of reason and authority, reviewed in the case of *Sharon v. Sharon*, 67 Cal. 185, under like provisions of the statute governing appeal as prevails here, and it is unnecessary to do more than to cite that case for an exposition of the authorities and reasons upon which we hold that appeal lies from the order or judgment of the district court for payment of alimony in the proceedings in question. Relator's counsel urges that, notwithstanding such right of appeal, this court should review the proceedings of the district court resulting in the commitment of relator for contempt, because the constitution (article VIII, § 3) provides that "each of the justices of the supreme court may also issue and hear and determine writs of *certiorari* in proceedings for contempt in the district court." Under this provision he argues that the scope of said writ is enlarged, so that, although relator has an appeal from said order or interlocutory judgment, and thereby relief from the effect thereof, the same should also be reviewed on *certiorari* where imprisonment for contempt is involved.

We cannot sustain this position. In our opinion, the framers of the constitution, in referring to the writ of *certiorari*, contemplated that proceeding as defined in our jurisprudence, as to its office and the conditions under which it may be invoked. (*In re MacKnight*, 11 Mont. 132; 28 Am. St. Rep. 451.) It follows, therefore, that relator has a remedy in the matter in question by appeal, if his contention is well founded, through which he may obtain relief, both from the imprisonment and from other methods of enforcing the order complained of. For these reasons an order will be entered remanding him to custody.

DE WITT, J., concurs.

HOFFMAN, RESPONDENT, v. IMES, APPELLANT.

[Submitted October 31, 1893. Decided November 2, 1893.]

ATTACHMENT—Service of writ on defendant.—Defendant in attachment is not entitled to service of the writ and an opportunity to secure the payment of the judgment by giving bond or depositing money prior to a levy upon his property, under section 181 of the Code of Civil Procedure allowing the plaintiff to have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give good and sufficient security to secure the payment of said judgment.

Appeal from Ninth Judicial District, Gallatin County.

Defendant's motion to dissolve the attachment was denied by ARMSTRONG, J. Affirmed.

E. P. Cadwell, for Appellant.

The defendant should have had an opportunity to either give a bond or deposit the money to prevent a levy of the writ of attachment. The writ should have been served upon the defendant before its levy. (Code Civ. Proc., §§ 181, 184, 186.) The provision of our statute in regard to the attachment of property for the security of a debt sued upon is mandatory, and in derogation of the common law, and must be strictly followed. The mode of attachment as provided by the code is exclusive. (*McBride v. Fallon*, 65 Cal. 303.) Proceedings for attachments are statutory and special, and must be strictly pursued. (*Roberts v. Landecker*, 9 Cal. 262; *Hisler v. Carr*, 34 Cal. 641.) Statutes should be fairly interpreted. (*Dickinson v. Vanhorn*, 9 Cal. 207.) Every prerequisite required by the statute must be complied with, and if not, the levy is void. (*Main v. Tapner*, 43 Cal. 206.) The right to a writ of attachment is essentially a creature of statute, and as the proceedings involve the involuntary dispossession of the owner, and antagonize the common-law idea of proprietary right, the statute upon which it is founded is strictly construed. (Wade on Attachment, §§ 2, 3, 5.) If any of the provisions of the statutes are not complied with by the officer in levying or executing his writ the lien is lost. (*Greenvault v. Farmers' etc. Bank*, 2 Doug. (Mich.) 502; *Buckley v. Lowry*, 2 Mich. 420; *Roelofson v. Hatch*, 3 Mich. 277; *Fairbanks v. Bennett*, 52 Mich. 61; *Adams v. Abram*, 38 Mich. 302.)

Hartman & Hartman, for Respondent.

I. The rule in Montana is, that an attachment statute is a remedial statute; that it should be liberally expounded, for the purpose of enabling the creditor to collect his debts, and secure a lien therefor. (*Cope v. Upper Missouri etc. Co.*, 1 Mont. 53, 57; *Levy v. Elliott*, 14 Nev. 435-38; *Langstaff v. Miles*, 5 Mont. 554; *Pierse v. Miles*, 5 Mont. 549; *McGee v. Fogerty*, 6 Mont. 237, 239; *Josephi v. Mady Clothing Co.*, *ante*, p. 195.)

II. The failure of the sheriff to notify the defendant in an attachment proceeding that he has a writ, and to give him time to deposit the amount with costs or security for the same, before making the levy, is not such a defect, if it is a defect at all, as can be reached by a motion to dissolve the attachment. Defects for which the attachment may be dissolved are: 1. Those constituting an irregular issuing of the attachment; and 2. Those constituting an improvident issuing thereof. (Drake on Attachment, 5th ed., c. 15, §§ 397, 415; 1 Wade on Attachment, §§ 276, 284.) An attachment irregularly issued can only be dissolved for defects appearing upon the face of the proceedings. (Drake on Attachment, § 415; *Cooper v. Reeves*, 13 Ind. 53; *Hill v. Bond*, 22 How. Pr. 272; *Wright v. Smith*, 19 Tex. 297; *Hill v. Cunningham*, 25 Tex. 25.) An attachment will not be discharged on motion for neglect of the sheriff to perform a statutory requirement in making a levy. The defects which may be reached by motion are defects in the issuing of the attachment. (Code Civ. Proc., §§ 200-02.) The statute will be searched in vain for a provision that the writ may be discharged on motion for defects in the levy.

II. Neither the statute nor the practice thereunder contemplates or requires any such notice or action on the part of the sheriff prior to the levy of the writ, as contended for by appellant. The practice of levying the writ and afterwards accepting the security or the amount, which has prevailed in this state for a quarter of a century, is fully warranted by the language of section 184 of the Code of Civil Procedure, even were that language less definite than it is. An examination of the sections of the code relied upon by the appellant will disclose much that is vague. It certainly will not disclose a statutory command to the sheriff to give notice to the failing debtor that

he will shortly proceed to levy a writ of attachment upon his property. Such a requirement can only be interpolated by implication. The statute in that regard is certainly vague, and the bench and bar of the state have construed it to mean that the sheriff shall levy the writ immediately, and if the amount is deposited or the security furnished afterwards, the writ is released. In such case, practical contemporaneous construction, by the bar, the bench, the officers interested, the parties to the suits, and the people, should certainly control. (Cooley's Constitutional Limitations, p. 84, original p. 70; *Stuart v. Laird*, 1 Cranch, 299; *Rogers v. Goodwin*, 2 Mass. 475; *Fall v. Hazelrigg*, 45 Ind. 576-85; 15 Am. Rep. 278.)

DE WITT, J.—This is an appeal by defendant below from an order of the district court refusing to dissolve an attachment. The motion in the district court was made upon several grounds, upon only one of which appellant now relies. That we will examine. Appellant's contention was and is that the attachment should have been dissolved for the reason that the writ was not served upon him, and opportunity given to him to give a bond, or make a deposit of money, prior to the levy upon his property.

Appellant relies upon that portion of section 181, Code of Civil Procedure, as follows: "The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant not exempt from execution attached as security for the satisfaction of any judgment that may be recovered in said action, unless the defendant give good and sufficient security to secure the payment of said judgment." His position is that the law does not allow the levy of the writ unless defendant is first given opportunity to secure payment of any judgment that may be obtained by giving bond or depositing money.

The whole object of the attachment law is to obtain security for the debt claimed in the action. If the debt be already secured by a mortgage, lien, or pledge upon real or personal property (Code Civ. Proc., sec. 181), the writ of attachment cannot be issued; but if the debt be unsecured, the creditor may procure security upon the property of defendant debtor

through the legal process of attachment. When this process is set in motion the sheriff is required to attach and safely keep so much property of the debtor as may be sufficient to satisfy the claims demanded, unless the defendant deposit the amount, or give the sheriff security by a good undertaking. (Code Civ. Proc., § 184.) It is not the intention of the statute that the officer shall, with this extraordinary writ in his hands, await the action of the defendant in giving security. The defendant may be absent from the jurisdiction. Other officers with other attachments may be seeking precedence in a levy. It is not to be held that the officer is to await the pleasure of an attachment debtor in giving security. On the other hand, the reasonable officer would extend all proper opportunity to the debtor to give the security contemplated by the attachment law, provided that he did not in any way jeopard the obtaining of the security through a levy upon property. The law gives the defendant the right to release the levy upon his property by giving the security at any time; but the defendant in this case, while he complains that he was not given notice that the levy was to be made, and that thereby he did not have opportunity to give security, still he is in this position that he did not at the time he discovered the levy, or at any time since, offer any security. He concedes that the issuance of the writ was regular. He asks that his property be released from a levy make upon a regular writ, and he asks this without tendering any bond or any deposit of money. The district court very properly denied his motion, and that order is hereby affirmed.

Affirmed.

HARWOOD, J., concurs.

NORTHERN PACIFIC RAILROAD COMPANY, RESPONDENT, v. BENDER, APPELLANT.

[Submitted, November 8, 1893. Decided, November 8, 1893.]

EXECUTIONS—Issuance after lapse of five years.—The fact that an execution issued upon a judgment within five years after its rendition was never returned will not prevent the granting of leave to issue an execution after that time, under § 349 of the Code of Civil Procedure, providing, that after five years from the entry of judgment, execution can only issue by leave of the court upon motion with proof that the judgment of some part thereof remains unsatisfied, but the leave shall not be necessary when the execution has been issued on the judgment within five years, and returned unsatisfied in whole or in part.

Appeal from Seventh Judicial District, Custer County.

Plaintiff's motion for leave to issue execution was granted by MILBURN, J. Affirmed.

Middleton & Light, for Appellant.

I. The fact that the execution was not returned can, of course, be shown, but the fact as to its being satisfied, or otherwise, can only be shown by the return of the officer, which is conclusive as between the parties. (7 Am. & Eng. Ency. of Law, 156.) Where the statute makes it unnecessary to obtain leave where the execution was issued during the five years next after the entry of judgment it was undoubtedly intended that the remedy by execution during the first five years be exhausted before the court could properly grant leave to issue execution. The record shows that the execution was issued and placed in the hands of the sheriff, but no excuse is offered or reason given why this remedy was not exhausted. An *alias* writ should only be issued after the return of the original writ. (7 Am. & Eng. Ency. of Law, 122.)

II. The statute, after getting both parties into court, then requires the party to establish his case by the oath of the party or other satisfactory proof. In the case at bar nothing was offered except the motion upon which the court made its order. By satisfactory proof is meant evidence to satisfy, adduced before a court in a judicial way. (19 Am. & Eng. Ency. of Law, 283.) No evidence was introduced, no party sworn, no opportunity for cross-examination of the statements submitted, which were largely the conclusions of the affiant, and not in

the nature of facts from which the court could rightly draw conclusions. Such being the case we contend no such showing was made that would warrant the granting of the order.

Cullen & Toole, for Respondent:

It will be presumed that the court trying the case found facts sufficient to support its judgment or order, and found them correctly. (*Mason v. Germaine*, 1 Mont. 263; *Ming v. Truett*, 1 Mont. 322; *Morse v. Swan*, 2 Mont. 306; *Fabian v. Collins*, 3 Mont. 229; *Clark v. Baker*, 6 Mont. 153; *Alder Gulch etc. Mining Co. v. Hayes*, 6 Mont. 31; *Bass v. Buker*, 6 Mont. 443; *Beck v. Beck*, 6 Mont. 318; *McMillan v. Carter*, 6 Mont. 220.)

PEMBERTON, C. J.—On the eighteenth day of November, 1887, the respondent recovered judgment against the appellant, in the district court in and for the county of Custer, for the recovery of possession of certain real estate situated in said county, and for one dollar, as damages for the detention thereof.

Within five years of the rendition of such judgment, execution was issued thereon, but was never returned. On the eighth day of August, 1893, five years having elapsed since the rendition of said judgment, the respondent filed its motion in the district court in said county, asking for an order of said court granting leave to respondent to cause an execution to be issued by the clerk of said court to carry into effect said judgment. The motion was filed under and in accordance with section 349, Code of Civil Procedure, which is as follows:

"After the lapse of five years from the entry of judgment, an execution can only be issued by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent, or nonresident, or cannot be found, to make such service, in which case service may be made by publication, or in such other manner as the court shall direct; such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due; but the leave shall not be necessary when the execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part."

The motion contains all the material allegations required by said statute. Notice of the filing of said motion was served upon the appellant, and he appeared by counsel in court at the hearing thereof, and resisted the same. The trial court granted the order prayed for, and from the granting of this order this appeal is prosecuted.

The appellant's principal ground of exception to the action of the court below appears to be founded upon the contention by appellant that the court could not grant the order for the issuing of an execution, because an execution had issued before the expiration of five years after the rendition of judgment in the case. The statute quoted above provides that "leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part." It seems, therefore, from this statute, that two things are necessary to render leave of court in such cases unnecessary, viz., the issuance of the execution within five years from the rendition of judgment, and the return thereof unsatisfied in whole or in part. As far as the record shows, it is not contended that the execution was ever returned at all. If appellant's contention means any thing, it means that respondent was entitled to execution without leave of court for its issuance. If so, how can the appellant be injured by the action of the court in ordering it to issue? The appellant appeared and resisted this motion. He tendered no issue as to any fact alleged in the motion of respondent. This was tantamount to a confession of the truth of the facts alleged in said motion, and constituted "satisfactory proof," other than stated in respondent's motion and affidavit, that the judgment was unsatisfied and due.

We are of the opinion that the errors complained of by the appellant are purely technical, and without merit.

The order of the court below is affirmed.

Affirmed.

HARWOOD and DE WITT, JJ., concur.

STRAYER, RESPONDENT, *v.* LEONARD, APPELLANT.

[Argued, October 24, 1898. Decided, November 6, 1898.]

MARRIED WOMAN—Right to maintain action for debt.—One indebted to a married woman for board and lodging furnished by her and upon a debt due her husband which he had assigned to her, cannot question her competence to maintain an action upon such indebtedness because she had not complied with the sole traders' act or the provisions for filing a separate property list, as such considerations relate to the rights of the husband and creditors.

Appeal from First Judicial District, Lewis and Clarke County.

Action for debt. Judgment was rendered for the plaintiff below by HUNT, J. Affirmed.

David B. Carpenter, for Appellant.

The common-law disability of husband and wife to enter into contracts had not been removed previous to the passage of the act approved March 3, 1887 (Comp. Stats. Mont., § 1439), on which plaintiff relies. (*Herron v. Frost*, 9 Mont. 308.) Section 1439 does not, nor was it intended to, apply to or regulate the contract rights of married women. This statute simply changes the rule of the common law in reference to the right of a married woman to sue for an "injury" (in tort) in her own name without joining her husband. This statute being in derogation of the common law must be strictly construed. Nothing will be supplied by implication, and it will not be presumed to alter the common law further than it expressly declares. (See cases cited in appellant's brief, *Herron v. Frost*, 9 Mont. 308.) Section 1439 only gives to married women an additional estate in, and dominion over, their separate property, and such statutes do not give her any additional right to contract in reference therewith. (2 Bishop on the Law of Married Women, 232.)

Walsh & Newman, for Respondent.

The act of March 3, 1887, commonly called the Woman's Emancipation Act, gave to a married woman all the rights that she possessed before marriage. She can sue and be sued and enter into contracts as if she were sole. She may even contract with her husband. (*Orum v. Sawyer*, 132 Ill. 443; *Snell v.*

Snell, 123 Ill. 403; 5 Am. St. Rep. 526; *Hamilton v. Hamilton*, 89 Ill. 349; *Kelley v. Jefferis* (Mont. April 18, 1893), 32 Pac. 753; *Shortel v. Young*, 23 Neb. 408; *McNaught v. Anderson*, 78 Ga. 499; 6 Am. St. Rep. 278; *Brickley v. Walker*, 68 Wis. 463; *Barker v. Lynch*, 75 Wis. 624; *Enyeart v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94; *Ramage v. Towles*, 85 Ala. 588; *Diefendorff v. Hopkins*, 95 Cal. 343; *Douglass v. Douglass*, 72 Mich. 86.) The question of the right of a married woman to make a contract or prosecute an action in her own name can only be raised by her husband, or her husband's creditors. (*Avery v. Moore*, 34 Ill. App. 121, 155; *Bedford v. Bedford*, 32 Ill. App. 460; *Casner v. Preston*, 109 Ill. 535; *Metropolitan Nat. Bank v. Rogers*, 47 Fed. 148; *Freiler v. Kear*, 126 Pa. St. 470.)

HARWOOD, J.—In this case plaintiff demands judgment against defendant on an alleged debt consisting of two items—one item of ninety-two dollars for board and lodging; and another of fifty-seven dollars and twenty cents for office rent. The action was first prosecuted to judgment in favor of plaintiff in the justice's court, and carried into the district court by defendant's appeal, where the trial *de novo* again resulted in judgment for plaintiff, from which latter judgment defendant appeals to this court.

The question here presented by appellant is that plaintiff is incompetent to sue and recover said alleged debt, because it appears she is a married woman, and has not complied with the statute in respect to married women becoming sole traders, nor filed a separate property list; and, further, that it appears that the item of fifty-seven dollars and twenty cents for office rent, included in said judgment, was assigned to plaintiff by her husband, and appellant insists that such assignment is void, on the ground that plaintiff, being a married woman, could not acquire the right to said account by assignment from her husband.

Whatever question might be raised on the part of the husband, or on the part of a creditor, as to the validity of said assignment, or as to the right of the wife to claim the proceeds for said board and lodging as against the husband or his cred-

itors, appellant is in no position to raise those questions, nor to suffer by payment to the wife. The failure of plaintiff to comply with the provisions of the sole trader's act or the provisions for the recording a separate list of her property may leave her property in a condition to be taken by her husband's creditors, or may leave the husband in a position to be held liable for the debts of plaintiff. These considerations relate to the rights of the creditors and of the husband, and neither of them are complaining. The creditors' rights are not prejudiced by the fact that the wife has left undone those things which would create certain exemptions of property, and of the liability in favor of herself and husband. So as to the husband, he not only transferred said account for office rent to his wife, the plaintiff, but he appeared at the trial, and by his testimony supported her claim thereto, and also her right to collect for said board and lodging. Under these conditions, of course he would be estopped from undertaking to claim and enforce payment of said items to himself after defendant had paid the same to the wife. According to our law of domestic relations it is considered not only lawful, but proper, for the husband to furnish the wife somewhat for the supply of her wants; but this defendant would have it that she could take nothing from her husband lawfully. If, in this resistance of the payment of his board bill or said office rent to plaintiff, defendant thinks he is upholding the rights of the creditors of the husband or wife, or upholding abstract principles of law concerning domestic relations, he is mistaken in his mission, and the hallucination under which he moves ought to be dispelled by an execution.

Judgment affirmed, with costs.

Affirmed.

DE WITT, J., concurs.

WORK ET AL., RESPONDENTS, v. NORTHERN PACIFIC RAILROAD COMPANY, APPELLANT.

[Argued, March 21, 1893. Decided, November 12, 1893.]

JUDGMENTS—*Missing record*.—A court of general jurisdiction has inherent power to supply a missing record in a cause within its jurisdiction, and therefore, where a judgment was rendered in a territorial court, while sitting as a federal court, and the record book in which such judgment was entered was transferred to the United States circuit court upon the admission of the state into the union, it is proper for the district court, which, under the enabling act had succeeded in jurisdiction of the case, to cause such judgment to be entered in its judgment book.

Appeal from Ninth Judicial District, Gallatin County.

Defendant's motion to vacate and set aside the judgment was denied by ARMSTRONG, J. Affirmed.

W. E. Cullen, for Appellant.

I. No statute in any jurisdiction authorizes the taking of more than one final judgment in any case, and without some statutory authority the power of the court to render a judgment is exhausted after it has been once exercised. It is not necessary, however, to establish by authority the invalidity of the judgment of the district court of Gallatin county, rendered by Judge Henry. This court granted the motion made by the respondents to dismiss the former appeal (11 Mont. 513), and the motion was grounded upon the proposition that the judgment of the district court of Gallatin county, sitting as a federal court, rendered by Judge Liddell was valid and the Henry judgment was a "mere useless formality." They are therefore now estopped from asserting its validity or attempting to enforce its satisfaction. (*Nuckolls v. Irwin*, 2 Neb. 60-66; *Newell v. Meyendorff*, 9 Mont. 263, 18 Am. St. Rep. 738; *Ohio etc. Ry. Co. v. McCarthy*, 96 U. S. 267; *Dreyfous v. Adams*, 48 Cal. 131; *Long v. Fox*, 100 Ill. 43; *McQueen v. Gamble*, 33 Mich. 344; *Callaway v. Johnson*, 51 Mo. 33; *Edward's App.*, 105 Pa. St. 103.)

II. The application to set aside this judgment was properly made to the court which granted it. (1 Black on Judgments, § 297; *Grattan v. Mattoon*, 51 Iowa, 622.)

The general rule is that, after the expiration of a term of court at which judgment is rendered, the court loses control over it, unless provision is made by statute giving the court authority to set it aside, reverse, or modify it within some specified time after its entry, but this does not apply to judgments void *ab initio*. "Every court possesses inherent power to vacate entries on its record of judgments, decrees, or orders, rendered or made without jurisdiction, either during the term at which they are made or after its expiration." (1 Black on Judgments, § 307; Freeman on Judgments, §§ 100, 107, 108; *State Bank etc. v. Abbott*, 20 Wis. 570; *Chipman v. Bowman*, 14 Cal. 159; *First Nat. Bank v. Grimes D. G. Co.*, 45 Kan. 510; *Pantall v. Dickey*, 123 Pa. St. 431; *Allen v. Krips*, 119 Pa. St. 1; *Williamson v. Hartman*, 92 N. C. 236; *Merrick v. Baltimore etc.*, 43 Md. 219; *Wharton v. Harlan*, 68 Cal. 422.)

The motion to vacate does not have to be made within any specified time, nor does the statute prescribing the time within which judgment may be set aside apply to it. (*Ladd v. Stevenson*, 112 N. Y. 332, 8 Am. St. Rep. 748; *Chipman v. Bowman*, 14 Cal. 159; *Inlay v. Carpentier*, 14 Cal. 173; *Cowles v. Hayes*, 69 N. C. 406.)

The motion is not a collateral, but a direct, attack upon the judgment. (*Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52; *People v. Mullan*, 65 Cal. 396; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448.)

III. The Henry judgment purports to be, and was, in fact, a *nunc pro tunc* judgment. The record of the case, as recited in the opinion of this court on the former appeal, shows that at the date of the entry there was no record evidence in Judge Henry's court that the case had ever been tried or any final judgment ordered therein. No judgment can be amended or one entered *nunc pro tunc* unless there is at the date of such amendment or entry some matter of record authorizing it, and this must be shown by some book belonging to the office of the court, and required to be there kept by law. (*Hudson v. Hudson*, 20 Ala. 364; 56 Am. Dec. 200; 1 Black on Judgments, § 135.)

E. P. Cadwell, for Respondent.

If a judgment can be reviewed by a motion after the term at which it was rendered, its void character must appear upon its face. If the void character of this last judgment entry (styled the Henry judgment) appeared from the face of the record, it as fully appeared by the record before this court when it passed upon this case on the former appeal (11 Mont. 513) as it does now. If it was void then it should have been reversed, for it must be conclusively presumed, that in every appeal this court passes upon every question raised, or that is in the record, or that the question raised and not passed upon, was waived by the appellant, when its decision is finally rendered. This court now has before it exactly the same record it had before, and this court is asked to again pass on the same case. Where will this practice lead to? Where will there be an end to litigation, if, as is contended by appellant, the judgment is void upon its face, or is void by the admissions of counsel? It is no more void now than then. If this practice is allowed to prevail, a judgment can be attacked at any time by motion. Will a judgment ever be good? (*Barkley v. Tiecke*, 2 Mont. 434; *Livermore v. Campbell*, 52 Cal. 75; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52; *Foster v. Hauswirth*, 5 Mont. 566; *People v. Mullan*, 65 Cal. 396; *Bell v. Thompson*, 19 Cal. 707; *Hegeler v. Henckell*, 27 Cal. 495; *Bostwick v. McEvoy*, 62 Cal. 502; *Wharton v. Harlan*, 68 Cal. 422; *Vantienburg v. Black*, 3 Mont. 467.)

An appeal lies from a void judgment. (*Livermore v. Campbell*, 52 Cal. 75.)

In this case appellant has appealed once upon the same record and has been accorded no relief.

A motion made to set aside a judgment as void must rely solely upon what appears upon the face of the record, i. e., the void character of the judgment must appear on the face of the record, and not by evidence *aliunde*. (Cases cited supra.)

Errors in the judgment of the supreme court can only be corrected by petition for a rehearing or by appeal to a higher court. (*Barkley v. Tiecke*, 2 Mont. 434.) When the statute

provides a remedy for an error of the lower court, parties aggrieved must follow that remedy. (*Vantilburg v. Black*, 3 Mont. 467.)

HARWOOD, J.—Counsel for appellant remarks in the introduction of the present consideration that, when this case was here on a former appeal, "the statement of the case therein made recites substantially all the facts necessary for the determination of the questions arising upon the present appeal." Therefore reference is made to that statement (11 Mont. 516) for an exposition of the condition of the case when the order was made in the court below, from which this appeal was taken. On return of the *remitititur* on the former appeal, defendant moved the district court of Gallatin county to vacate and set aside the judgment in this case, recorded in the judgment-book of that court, on December 9, 1890, "for the reason that said court had no jurisdiction to enter said judgment, and that the same is void, and of no effect." This motion was opposed by respondents, and, upon consideration, it was overruled, and the judgment was allowed to stand as recorded in the judgment book of said court, from which order overruling said motion this appeal is taken.

It will be remembered by reference to the former treatment of this case that the trial thereof was had and judgment entered by the territorial district court, sitting for the trial of causes arising under the constitution and laws of the United States in that district, of which Gallatin county was then a part; that, on the admission of Montana into the union, this case, together with the record wherein the judgment was entered, and all its belongings, was transferred from said territorial district court to the United States circuit court for the district of Montana, but, on consideration of the enabling act, it was found that said district court within and for Gallatin county succeeded in jurisdiction to said case, instead of the United States court, as was first supposed; that thereupon the records and papers pertaining to this case were transferred to the district court within and for Gallatin county, except the record book of said territorial district court, wherein the proceedings showing trial and judgment in said action were entered. That record book ap-

pears to have been committed to the custody of the United States circuit court for the district of Montana. Under these circumstances, the district court within and for Gallatin county, finding it had succeeded to jurisdiction of said case and the existing judgment, but being without immediate custody of the record wherein said judgment was entered, caused to be recorded in its judgment book, on December 9, 1890, said judgment, denominating this entry as a "judgment *nunc pro tunc*" in said cause. This entry is attacked by the motion of appellant, which is the subject of the present appeal.

It is not disputed that the district court of Gallatin county has complete jurisdiction of said case and judgment, as held by the United States court in its interpretation of the enabling act. A court of general jurisdiction has inherent power to supply a missing record in a cause within its jurisdiction. (1 Black on Judgments, § 125; 1 Freeman on Judgments, § 89.) And we do not conceive, nor has there been shown, any difference in principle in the matter of supplying a record which is missing from the court having jurisdiction of the case, by reason of the original having been taken away by lawful authority, and supplying a record which is missing by reason of the original having been lost, destroyed, or wantonly abstracted. Here was a case within the jurisdiction of the district court of Gallatin county, but the record containing the original entry of the judgment therein was not in the custody of that court, because said record had, through the municipal changes occurring by the admission of Montana into the union, been, by lawful authority, placed in the custody of another court. Under these circumstances, we think the court having jurisdiction of said judgment had authority to cause the record thereof to be supplied by an entry in its own judgment-book; and, moreover, that such action was eminently proper, to the end that the record of the court to which jurisdiction of the judgment had been transferred should show the same and all further proceedings therein. This entry in question may not be technically the entry of a judgment *nunc pro tunc*. It would seem to be more in the nature of supplying a missing record, which had been brought into existence, but which was out of the custody of the court having jurisdiction thereof. However,

no question on that score is raised by appellant, nor is there any complaint that the record of said judgment placed in the judgment-book of the district court of Gallatin county of December 9, 1890, differs in any material particular from the original record of the judgment.

In urging this motion to strike said entry from the record, counsel for appellant turns against respondents' counsel the edge of his own argument on the former appeal—that said entry of December 9, 1890, was a "useless formality," and holds up to view his inconsistency in now attempting to maintain the usefulness of that formality. This inconsistency of respondents' counsel appears to be the main ground upon which appellant expects to maintain his position. We would not be justified in holding the action of a court erroneous simply because of shifting or inconsistent positions assumed by counsel in respect thereto, when such action comes under consideration in various appeals. Following such criterion, judicial view would "turn its course, like a weather-vane, to every wind that blows," instead of proceeding upon real, substantial, and harmonious reasons.

The question on the former appeal was whether the judgment in this action had been entered by the territorial court, and that question was disposed of. Not only so, this court refused, on motion for rehearing, to interfere with the action of the district court of Gallatin county in respect to recording said judgment in its judgment-book, although counsel sought to have that entry declared void, on the ground that two judgments were recorded against defendant in said action, both of which it would find "potential realities" in the future. But that motion was denied, because there appeared to be no foundation for such proposition. The United States court, in charge of said record for other purposes, disclaimed all jurisdiction of said case and judgment, and, moreover, pointed out that the district court within and for Gallatin county succeeded to such jurisdiction. Under such conditions the federal court, while disclaiming jurisdiction of that judgment, would not undertake to execute it.

Our consideration of this matter brings us to the conclusion that the order of the district court of Gallatin county refus-

ing to eliminate the record of said judgment from its judgment-book ought to be affirmed, and an order will be entered by this court to that effect.

Order affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

WETZSTEIN ET AL., RESPONDENTS, v. JOY ET AL., APPELLANTS.

[Argued February 14, 1893. Decided November 27, 1893.]

ACTION FOR MONEY HAD AND RECEIVED—Promissory notes—Contract to purchase.—Where the payee of plaintiff's note accepted the defendant's offer to buy it for a certain sum, but after receiving defendant's check for such amount returned it without having retracted his offer to sell, or objecting to the mode of payment, and defendant, after sending the check, instituted suit on the note, which suit plaintiff settled on the same day by payment in full, and on the following day, the note having been sent for collection to a bank in the town where the plaintiff and defendant resided, the plaintiff voluntarily paid it in full a second time, without any request from the bank, and against the advice of defendant, who offered to indemnify him, he will be limited in his recovery in an action against defendant for money had and received, to the amount of the uncollected check so given by defendant to purchase the note.

Appeal from Sixth Judicial District, Park County.

Action for money had and received. Judgment was rendered for the plaintiff below by HENRY, J. Modified.

Statement of the case by the justice delivering the opinion.

This action is brought by plaintiffs to recover money alleged to have been had and received by defendants, and belonging to plaintiffs. The facts are as follows: Mentor Wetzstein, the husband of Sophia, and Allan R. Joy, the husband of Hattie M., are joined as parties with their respective wives. These husbands acted as agents for their wives throughout all the transactions involved in this litigation. In October, 1890, one H. W. McLoughlin, of Missoula, held and owned the promissory note of these plaintiffs secured by a mortgage. The note was for \$550, dated January 19, 1889, payable in one year from date. A. R. Joy was an attorney at law at Livingston, Park county, Montana. He claims that, as a result of negotiations and correspondence during October, 1890, with Mc-

Loughlin, he bought this note and mortgage for \$550, and that he assigned the same to his wife. On October 21st she, by her attorney, A. R. Joy, commenced an action in the district court of Park county for the collection of said note and foreclosure of the mortgage. The complaint in that action was the ordinary one in such a suit. It alleged, among other things, that plaintiff was the owner and holder of said note and mortgage. Summons was served October 21st. On the same day, and at once, Wetzstein went to Joy, and offered to pay, if the claim for attorney's fees was remitted. This was agreed to. He went to his bank, and he and D. A. McCaw, cashier of the bank, went to the clerk of the court, and gave to him McCaw's cashier's check for \$671.86, instructing the clerk to give the same to Joy when Joy dismissed the action. This was done the next day. These facts appear by the proceedings and evidence. Almost at once (it does not appear by the record just when) Wetzstein demanded from Joy the return of this money, which was refused. Wetzstein then commenced this action against the Joys.

The complaint in this action sets forth the making of the note and mortgage by the Wetzsteins to McLoughlin, and the bringing of the action against the Wetzsteins above described. It also sets forth that the complaint in *Joy v. Wetzstein*, alleged that the note and mortgage had been assigned by McLoughlin to Hattie M. Joy, and that she was the owner and holder of the same. The complaint herein also states that Allan R. Joy, agent of Hattie M. Joy, stated to Mentor Wetzstein the same facts as were set out in the complaint in *Joy v. Wetzstein*. The complaint herein says further, that plaintiffs believe the allegations of the complaint in the other case, and the corresponding statements of A. R. Joy, and that the plaintiffs were induced thereby to pay, and did pay, \$671.86 to Hattie M. Joy. This complaint then alleges that the allegations of Hattie M. Joy's complaint, and the statements of A. R. Joy, that Hattie M. Joy was the owner of the note and mortgage by assignment, were false, and known to be false to the Joys, and made with intent to deceive; and were not known to the plaintiffs to be false, but were believed by them to be true. The complaint herein says, that in fact the note and mortgage were

never assigned to the Joys, nor had Joy any right to collect the same. It further says that thereafter, on the—day of October, 1890, plaintiff, Sophia Wetzstein, herein, was obliged to pay to McLoughlin the amount due on said note, to wit, \$672.06. The complaint demands judgment for \$671.86.

The Joys' answer in this case sets out that A. R. Joy did in fact buy the note and mortgage from McLoughlin, and assigned it to his wife, and that she was the owner and holder thereof when she brought the action of *Joy v. Wetzstein*.

At the close of the trial, and after the introduction of evidence by both sides, plaintiffs moved the court to direct a verdict for plaintiffs on the ground, in effect, that defendants' evidence showed the truth of all the material allegations of the complaint. This motion was granted. The court instructed the jury accordingly, and a verdict was found for plaintiffs for \$671.86. Defendants' motion for a new trial was denied. They appeal from that order, and from the judgment. The error assigned is the action of the court in instructing the jury as above noted.

Allan R. Joy, and H. J. Miller, for Appellants.

I. There are but three grounds upon which a suit can be maintained to recover back money paid, to wit: Fraud, mistake, duress. (*Lamborn v. County Commrs.*, 97 U. S. 181.)

In this case no mistake or duress is claimed; the only allegation relied upon by plaintiffs is fraud.

The only material question here raised is, "Did Hattie M. Joy, plaintiff in the former action, demand more than was believed to be due and just?" If not, there was no fraud, and as to these plaintiffs the matter is *res adjudicata*.

In other words, after the purchasing and paying for property in good faith, is it fraud for the purchaser to publicly declare his ownership, and ask the proper court to enforce his property rights therein?

There was no fraud or misrepresentation of fact.

Misrepresentation must not only be in something material, but it must be something in regard to which the other party places a known trust and confidence in the other. (1 Story's *Equity Jurisprudence*, sec. 197.)

A judgment will not be set aside on the ground of fraud when the very fraud alleged was tried and passed upon by the issues of the former action, nor when the facts could have been set up as a complete defense in the former action. (*Kelly v. Cristal*, 81 N. Y. 619.) The fraud must be such that the party was prevented from making his defense. (*United States v. Throckmorton*, 98 U. S. 62.) The fraud in obtaining a judgment must be in the fact of its rendition, and not in the support of the issues.

A party who comes into court and simply stands upon his legal rights is guilty of no fraud. (*Ingalls v. Miller*, 121 Ind. 189.)

If there was a sale of the note to Joy, his receipt of the money due thereon cannot be questioned.

Where the purchase money is paid, an agreement for sale need not be in writing. (Rev. Stats. Mont., p. 652, §§ 222-24.)

Section 226, page 653, of the Montana Statutes, as to immediate delivery, applies only to creditors of vendor and subsequent purchasers in good faith. Wetzstein does not claim to come within either class, and is barred from pleading this statute.

II. An offer by letter is a continuing one until the letter is received, and for a reasonable time thereafter.

Acceptance may be made at any time before withdrawal.

An acceptance is made and is communicated under this rule when the party receiving this offer puts into the mail his answer accepting it, thus making a complete and binding contract, the specific performance of which courts will enforce.

Offer cannot be withdrawn after letter of acceptance is mailed, and such acceptance is at the risk of the party whose proposition is accepted, whether it arrives in due course of mail or telegraph, correctly or incorrectly, or not at all. (*Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Francis v. Barry*, 69 Mich. 311; *Little v. Dougherty*, 11 Col. 103; *Darlington Iron Co. v. Foote*, 16 Fed. Rep. 646; *Moore v. Pierson*, 6 Iowa, 279, 294; 71 Am. Dec. 409; *Allen v. Bennett*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bing. 9; *Western Union Tel. Co. v. Chicago etc. R. R. Co.*, 86 Ill. 246; 29 Am. Rep.

28; *Moore v. Mountcastle*, 61 Mo. 424; *Abbott v. Shepard*, 48 N. H. 14; *Burr v. Insurance Co. of N. A.*, 61 Ind. 488; *Hallowell v. Commercial Ins. Co.*, 26 N. J. L. 268; *Hamilton v. Lycoming M. I. Co.*, 5 Pa. St. 339; *Durkee v. Vermont Cent. R. R. Co.*, 29 Vt. 127; 2 Kent's Commentaries, 477; Gray on Communication by Telegraph, § 115; Scott and Jarnagin on Law of Telegraphs, § 347. See also *Mactier v. Frith*, 6 Wend. 103-11; 21 Am. Dec. 262.)

In *Ide v. Leiser*, 10 Mont. 6, 24 Am. St. Rep. 17, this court indorsed these views, and held that these contracts could be specifically enforced, the same as contracts of any other nature.

An assignment of a note operates as a constructive delivery, and if the assignor continues in possession after the assignment, he holds it only as agent of the assignee. (1 Daniels on Negotiable Instruments, § 748 a.)

Under our statutes the action shall be brought in the name of the real party in interest. (*Davenport v. Woodbridge*, 8 Me. 18; *McGee v. Riddlebarger*, 39 Mo. 367; *Grand Gulf Bank v. Wood*, 12 Smedes & M. 484; *Ducasse v. Keyser*, 28 La. Ann. 419; *Adams v. Robinson*, 69 Ga. 628. A verbal sale of property in the hands of a third person with an order for the delivery to the purchaser will enable the purchaser to maintain replevin. (*Planters' etc. Ins. Co. v. Tunstall*, 72 Ala. 147; 2 Story's Equity Jurisprudence, 1047.)

III. Wetzstein paid this claim with a full knowledge, or at least means of knowledge, not only of all the facts, but of his own legal rights in the matter; and he cannot now recover it back from the defendants. If he can recover at all, it must be from the one to whom he made such reckless payment. (*Brown v. McKinally*, 1 Esp. 279; *Dawson v. Remnant*, 6 Esp. 24; *Evans v. Gale*, 18 N. H. 400; *Wolfe v. Marshal*, 52 Mo. 168; *McMillan v. Vischer*, 14 Cal. 240; *Loomis v. Pulver*, 9 Johns. 244; *Oceanic S. Nav. Co. v. Tappan*, 16 Blatchf. 297; *People v. Foster*, 133 Ill. 496; *Prickett v. Madison Co.*, 14 Ill. App. 456; *Mays v. Cincinnati*, 1 Ohio St. 268-78; *Kraft v. Keokuk*, 14 Iowa, 87; *Bailey v. Paullina*, 69 Iowa, 463; *Murphy v. Creighton*, 45 Iowa, 182; *Cook v. Boston*, 9 Allen, 393; *Town of Ligonier v. Ackerman*, 46 Ind. 553; 15 Am. Rep. 323,

and cases there cited; *Town Council v. Bennett*, 34 Ala. 400, and cases cited; *Lester v. Baltimore*, 29 Md. 417; 96 Am. Dec. 542; *Fellows v. School District*, 39 Me. 559, and cases cited; *Phillips v. Jefferson Co.*, 5 Kan. 417; *Lamborn v. County Comr's*, 97 U. S. 186; *Webber v. Aldrich*, 2 N. H. 462; *Taylor v. Board etc.*, 31 Pa. St. 75; 72 Am. Dec. 724, and cases cited.

A. J. Campbell, and *John J. Smith*, also for Appellants.

I. Whether or not Mrs. Joy was lawfully entitled to receive payment on the note in controversy at the time she brought her action to foreclose is, we think, the vital question in the case. If she had such title to the note that a payment to her by the Wetzsteins extinguished their liability on the note, then it is immaterial whether she had the note in actual possession or not when payment was made. (*McGee v. Riddlesbarger*, 39 Mo. 365; *Ide v. Leiser*, 10 Mont. 6; 24 Am. St. Rep. 17; 1 Sutherland on Damages, 388.)

McLoughlin's offer to sell the note to A. R. Joy, and Joy's acceptance by letter, inclosing a check for the purchase price, constituted a completed bargain and sale of the note, without any actual delivery of the note. (Anson on Contracts, p. 30, note 1; Benjamin on Sales, Bennett's ed., book 1, § 54; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; 8 Am. Rep. 100.)

In bringing her action, Mrs. Joy anticipated that McLoughlin would forward the note as he agreed, and if any harm was done by her, it resulted wholly from her confidence in McLoughlin's promise, and not from any attempt to injure the Wetzsteins.

The mere allegation in her complaint that she was the owner and holder of the note, if technically untrue in a legal sense, could not, under the circumstances of this case, constitute such fraud as would enable the Wetzsteins to recover back. Having made a voluntary payment without duress, or even protest, they should have forced the adverse claimants to the note to litigate their rights before paying a second time. In fact, Wetzstein had no right to pay McLoughlin after notice of the assignment to Joy, even though McLoughlin still held possession of the note. (1 Sutherland on Damages, 388; *Chase v. Brown*, 32 Mich. 225.)

II. Respondent contended in the court below that the check sent by Joy to McLoughlin was not a sufficient compliance with McLoughlin's request to send him a draft. A check is always a draft, while a draft may not be a check. (Anderson's Law Dictionary, 173, 381.) The sending of the check by Joy was a full compliance with McLoughlin's demand. Again, McLoughlin made no objection to the check on that ground, and when not objected to on that ground by him, it constituted a sufficient compliance with his request, and if money had been demanded the check would have been a good tender. (*Jones v. Arthur*, 8 Dowl. Pr. 442; *Mitchell v. Vermont etc. Co.*, 67 N. Y. 280; *Walsh v. St. Louis Ex. & M. H. A.*, 101 Mo. 534.) When McLoughlin did not make the objection that it was not a compliance with his contract, Wetzstein could not raise the objection for him.

Savage & Day, for Respondents.

I. An assignee of a mortgage without the assignment of the note secured thereby cannot maintain action of foreclosure. (8 Am. & Eng. Ency. of Law, page 209, and cases cited.) The delivery of a mortgage, unaccompanied by the bond or note, does not transfer the title to the mortgage. (*Merritt v. Bartholick*, 36 N. Y. 44.) In an action on the note it would have been necessary to have alleged and proved that the plaintiff was the holder of the note. In New York it is held that where two or more persons claim the ownership of the mortgage, and one of them commences an action to foreclose, it is proper and advisable to make the other claimants parties defendant. (8 Am. & Eng. Ency. of Law, 231.) See, also, *Kellogg v. Smith*, 26 N. Y. 19, which holds that a person taking an assignment of a mortgage from an assignee who has not possession of the note and mortgage does so at his peril. To constitute a legal assignment of the mortgage it is essential that the mortgage be delivered accompanied by bond or note secured. (15 Am. & Eng. Ency. of Law, page 843.) An equitable assignment of a mortgage is one arising from the transfer of a debt secured, on the theory that the mortgage is but an incident of the debt, and there can be no equitable assignment without a transfer of the note, either by indorse-

ment or by delivery; but where the note is transferred without indorsement, the power of an attorney would be necessary to enforce it. (15 Am. & Eng. Ency. of Law, 844-47.) A discharge by one claiming to be the assignee of a mortgage, but who is in fact a stranger thereto, and not in possession thereof, is void. (*De Laureal v. Kemper*, 9 Mo. App. 77, cited in Boone on Mortgages, § 154.)

II. Where one has received the money of another, and has not the right, conscientiously, to retain it, the law imposes interest as damage for the breach of an implied contract to pay it over. Wherever the plaintiff's money has come into the hands of the defendant, by fraud or imposition, the defendant is liable for interest from the time it is withheld. (11 Am. & Eng. Ency. of Law, § 397, and notes.) In an action for the unlawful taking of personal property, interest is to be allowed as a matter of legal right, from the time at which the value is estimated. (*Hamer v. Hathaway*, 33 Cal. 117.) A party who has fraudulently obtained, or wrongfully detained, the money of another, is liable for interest from the time of his obtaining or detaining the same. (*Wood v. Robbins*, 11 Mass. 504; 6 Am. Dec. 182.)

III. The statements of appellants that Hattie M. Joy owned the note and mortgage was false. "Every contracting party, when not in actual fault, has the right to rely upon the express statement of an existing fact, the truth of which is known, or presumed to be known to the other contracting party who made it, and is unknown to the party to whom it is made, when such statement is the basis of mutual agreement. He is under no obligation to investigate and verify the statement to the truth of which the other party to the contract, with knowledge or notice, has deliberately pledged his faith." (Bigelow on Torts. 26.)

IV. It is well settled upon the broad principles of justice, that a false affirmation made by one man to another with intent to defraud him, and whereby he is damaged, is actionable, no matter whether the party practicing the deceit is benefited or not. This doctrine has never been shaken. (*Hunsaker v. Sturgis*, 29 Cal. 146.)

In this matter the wrongdoers are benefited to the extent of the amount claimed in the complaint, no consideration therefor.

It is contended by appellants that the respondents are estopped from recovery for the reason that they paid the money over.

The doctrine of estoppel is not applied except to prevent the consummation of fraud. Otherwise it would seem to be a violation of sound morals, a reward and encouragement to fraud, a sword for the destruction of the unwary. (*Franklin v. Merida*, 35 Cal. 558; 95 Am. Dec. 129; *Buller v. Collins*, 12 Cal. 457.)

DE WITT, J.—The action of the district court in instructing the jury to find for the plaintiffs was, in effect, to take the case away from the consideration of the jury, and for the court to find that plaintiffs had introduced testimony tending to prove the material allegations of the complaint, and that defendants had not introduced testimony tending to contradict the plaintiffs, or tending to establish their defense. The action of the court was in the nature of a nonsuit of the defense, together with a holding that the facts made a case for this plaintiff.

There is no material conflict in the testimony. We will state it as contained in the record, and then determine whether it justified the action of the court. About October 4th, at Livingston, McLoughlin informed Joy that he held the note and mortgage of the Wetzsteins. It seems that McLoughlin wished to dispose of it. There was then due \$121.86 interest. Joy offered \$550, which was the face. This was accepted, and McLoughlin told Joy to send the money to Missoula. Joy did not do so for a week. He then wrote to McLoughlin at Missoula, and asked him if he was still willing to take his offer for the note. McLoughlin replied on October 15th as follows: "Yours of the 12th received. In reply will say that you may send me the draft for \$550, and take up the note and mortgage." On October 17th Joy sent to McLoughlin, at Missoula, his check for this amount, \$550, with his letter accepting the proposition, and requesting McLoughlin to forward the note and mortgage and an assignment. It does not appear that McLoughlin at that time or ever retracted his offer of October 12th. The method of payment by Joy's check was satisfactory to McLoughlin. No objection was ever made by

him to the method of payment, but this check came back to Joy; it does not appear when, or from whom. It was not collected by McLoughlin. It does not appear that it was returned before October 22d. The note and mortgage never came to Joy from McLoughlin. They did come to D. A. McCaw, cashier of the National Park Bank of Livingston, on the morning of October 22d. This was the day after Wetzstein had paid into court, in the presence of McCaw, the McCaw cashier's check to satisfy the note. Wetzstein said that he understood the note and mortgage were in the bank for collection when he paid Joy on October 21st. Now, McCaw had, at the instance of Wetzstein, on October 18th, written to McLoughlin, at Missoula, for the note and mortgage, and Wetzstein had deposited with him, McCaw, \$680, to be paid to McLoughlin when he delivered the note and mortgage. It seems that this Wetzstein-McCaw matter was unknown to McLoughlin, at least prior to his receipt, if he did receive it, of McCaw's letter of the 18th. This letter was one day later than the letter of Joy to McLoughlin sending the \$550. At one place in his testimony McCaw says that he sent the money to McLoughlin on the 18th, and again it appears that he sent it on the receipt of the note and mortgage, on the 22d. In any event, Wetzstein had deposited the amount with him for the note and mortgage before he, Wetzstein, paid Joy on the 21st. Now, Wetzstein claims that after paying Joy he was obliged to pay the amount the second time, to McLoughlin. As the evidence in the case appears, he was not obliged to do any thing of the kind. Joy told him not to pay to the bank or McLoughlin; that he (Joy, or Mrs. Joy) owned the note, and he would give him (Wetzstein) a \$10,000 bond to protect him. McCaw, bank cashier, did not require Wetzstein to pay the note. The fact is that Wetzstein manifested uncommon assiduity in rushing to pay his note a second time, when no one was pushing the payment, and the person to whom he had already paid offered him abundant indemnity. Wetzstein exhibited a fever of liquidation, which is as unusual generally as it is inexplicable in this case. McCaw's conduct also is extraordinary. He prepared his cashier's check, and went with Wetzstein to the clerk of the court, to pay the note on the Joy-Wetzstein suit.

He did this when, as he says, he had sent to Missoula for the note and mortgage at Wetzstein's request, and when he had, as he says, Wetzstein's money in his bank to pay McLoughlin for the note and mortgage.

Now, this peculiar condition of acts and facts plaintiff claimed before the district court established his cause of action against defendant; that is, that defendant Hattie M. Joy was not the owner or holder of the note and mortgage when she commenced the action to foreclose. The court took this view, and ruled accordingly. But we are of opinion that there was not evidence to sustain this position. The contract between Joy and McLoughlin is shown in evidence, and also the payment by Joy to McLoughlin of the \$550, by a method which was within the contemplation of the parties, and not objected to by McLoughlin. To be sure, the check of Joy to McLoughlin came back to Joy, but not before Wetzstein had paid Joy. McLoughlin is not in court in this case denying the making of the contract, which Joy testified was made between himself and McLoughlin. But this diligent debtor, Wetzstein, takes it upon himself to say that the Joy-McLoughlin contract was not made. In his anxiety to interpret, or deny, rather, the contract of other parties, he accentuates his views by forcing his money onto McLoughlin. The sole evidence of plaintiff's contention that Joy was not the owner of the note and mortgage is the fact that Wetzstein and McCaw, between them, managed to get the possession or custody of the note and mortgage into McCaw's hands. We are of the opinion that this fact was not evidence that Joy was not the owner, in the face of Joy's testimony as to his contract with McLoughlin, and in the absence of McLoughlin's testimony as to the transaction. It is true that Joy was not the "holder" of the note and mortgage, in the sense of having a manual grasp upon the paper upon which the note was written. But the evidence does not show that he was not the legal holder, and entitled to bring action for its collection.

It is plain that the judgment in this case cannot be affirmed. The case, as it is before us, is a most peculiar one; but, upon a consideration of the undisputed facts, we are of opinion that a modification of the judgment can be made which will do sub-

stantial, and indeed exact, justice between the parties. The situation seems to be as follows: Joy's case, as he presents it, is that he concedes he has \$550 in his hands, which sum is the consideration for which he bought the note and mortgage. Upon this sum he makes no claim. It came into his hands in this manner, that is to say: Wetzstein interfered with the Joy-McLoughlin contract, and thrust his money in McLoughlin's hands. Then McLoughlin sends the \$550 along to Joy. That amount thus went around the circuit from Wetzstein, through McLoughlin, to Joy. Thus Wetzstein has gotten it into the hands of Joy. It is in Joy's hands under the circumstances that McLoughlin disclaimed it by sending it to Joy, and Joy concedes that he does not own or claim it. Wetzstein claims this amount, and more, too; but, as to this amount—\$550—no one says him nay. With these facts and rights and claims of the parties agreed to and admitted, as the case is before us, there seems to be no reason why Wetzstein should not retain his judgment to the extent of \$550 against Joy. The case is therefore remanded to the district court, with directions to modify the judgment so that Wetzstein shall recover from Joy \$550, without interest.

It is further ordered that the costs be taxed against the respondent Wetzstein, for the reason that this whole controversy arose from respondent's acts in needlessly procuring this \$550 to be conveyed into Joy's hands.

Modified.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*concurring*).—I am unable to find in this case grounds to support the ruling of the trial court in peremptorily instructing the jury to return a verdict for plaintiff, and thereon entering judgment.

The action is for recovery of money had and received. In answer to the complaint, defendants allege ownership of the chose in action upon which they collected the money in controversy, and allege in detail all the facts concerning the transaction whereby they claim to have purchased from McLoughlin said chose, and transmitted to him payment therefor in fulfillment of their part of said transaction, whereby they claim

to have become the owners and legal holders of said chose; that plaintiff had knowledge of all the details of said transaction when he paid the amount of said debt to McLoughlin, after having paid the same to defendant; and that plaintiff made such payment to McLoughlin, conniving and conspiring with him to defraud defendants. This answer was entertained as a sufficient defense.

Plaintiffs by reply, denied the allegations of the answer "on information and belief," so far as such averments related to the transaction between McLoughlin and Joy. Now, upon the trial, defendants introduced proof supporting the allegations of their answer, which proof was not rebutted, McLoughlin not being present as a party or witness to dispute the alleged transaction whereby Joy claims to have purchased said demand; and plaintiff Wetzstein made no attempt to rebut the testimony offered by defendants in support of the allegations of their answer. Notwithstanding this state of the case, the court, on plaintiffs' motion, instructed the jury to return a verdict against the defendants for the recovery demanded in the complaint.

It is plain that, if the answer alleges a defense (and this is not disputed in any stage of the case, either in argument or by proceeding to strike out the answer or any part thereof), then the ruling of the court practically taking the case from the jury, and summarily determining the issue in favor of plaintiffs, cannot be sustained.

In support of the court's ruling, respondents' counsel argue that it was justified, because the testimony offered in support of defendants' answer showed that defendants were not in actual possession of the note and mortgage when payment thereof was collected from Wetzstein. There is no averment in the answer that defendants were actually in possession of said chose when the money was collected. The allegations in that regard were a recital of the facts constituting said transaction between McLoughlin and defendant Joy, whereby, as defendants allege, Hattie M. Joy "became the owner and legal holder of said note and mortgage"; and issue was joined on all these averments by plaintiffs' replication; and when the trial was had, defendants supported their averments by proof. But

plaintiffs introduced no proof to contradict the showing that defendants had purchased said demand as set forth in the answer and supported by proof, but, apparently conceding those facts, respondents' counsel argue that, inasmuch as said note and mortgage had not been actually assigned and delivered, Joy could not have enforced specific assignment or delivery thereof to him; that his only remedy was an action for damages against McLoughlin for breach of the contract of sale. Plaintiffs' counsel thus admit that McLoughlin had gone so far in the transaction as to commit himself to damage for failure to deliver the chose in question. They practically admit that McLoughlin had sold said demand to Joy, and that Wetzstein had full knowledge of said sale when he interposed to intercept the transaction, and thrust in his payment a second time, as the evidence shows without dispute, relying upon recovery of his first payment from defendants merely, because plaintiff had succeeded in overtaking said note and mortgage outside of defendants' possession. Whether Joy would have obtained possession of the note and mortgage if plaintiff had not taken it up and canceled it, thus destroying the possibility of Joy getting possession, depends possibly upon events as much as upon abstract propositions of law. But, conceding respondents' position that Joy only had an action for damages for McLoughlin's failure to deliver, that action might have brought forth delivery if plaintiff had not wrongfully interposed and made delivery impossible; because McLoughlin, to escape or mitigate damages, might have delivered the thing in question, which, as the case stands, it is admitted Joy had purchased from McLoughlin.

The case is in no position before this court, or the court below, to admit of close legal deductions as to what shape proceedings between Joy and McLoughlin might have taken, or what result might have been attained. It suffices for this decision that plaintiff did not contradict the facts set up in defense, to the effect that by purchase defendants became the legal owners of said demand, and that plaintiff knew that fact when he made payment to McLoughlin. Notwithstanding these conditions, plaintiff, in effect, reached forth, and took the controversy into his own hands, and, not waiting at all to be

drawn into it, made payment to McLoughlin over Joy's claim of ownership, and brought this action to recover the first payment from Joy. And, when he was met in defense by the allegation of the facts constituting the transaction whereby Joy claims to have purchased said demand, he denied those facts "on information and belief"; thus taking upon himself the burden of showing that said transaction had not occurred between Joy and McLoughlin. In this plaintiff signally failed, for Joy supported his answer by proof, and no proof whatever was offered in rebuttal. The mere fact that defendant had not possession of the thing is not sufficient to support plaintiff's action, for one may have the right to a thing or chose and not be in actual possession thereof. Having thus admitted the purchase by Joy, and that plaintiff had actual knowledge of that transaction when he made payment to McLoughlin, plaintiff cannot expect to be sustained in thus attempting to take away from defendants the fruit of their purchase. A strict application of legal principles to the conditions shown in this case would have nonsuited plaintiff, and allowed him no recovery. But on the whole showing it is just that his recovery be limited to the amount paid by Joy to McLoughlin, which, by plaintiff's interference, he got returned to Joy, and his own payment accepted instead. For these reasons I concur.

13 458
14 515
34^a 957
37^a 366

LANG ET AL., RESPONDENTS, v. CADWELL ET AL.,
APPELLANTS.

[Argued March 28, 1893. Decided November 27, 1893.]

CONTRIBUTION BETWEEN CO-TENANTS—Attorneys' fees.—Attorneys' fees stipulated in a mortgage to be paid in case of suit are not recoverable by a mortgagor in an action against his co-mortgagor to enforce contribution and subject the latter's interest in the common property by foreclosure of the mortgage to its proportion of the mortgage debt, where the former, though being obliged to take up the mortgage to avoid foreclosure, had not been compelled to pay such fees.

SAME—Mortgages—Personal judgment.—One of two mortgagors who upon being obliged to pay the mortgage debt takes an assignment of the mortgage to himself is not entitled to a personal judgment against the grantee of his co-mortgagor in an action to enforce contribution and for the foreclosure and sale of the latter's interest, where the conveyance was made subject by express provision to the mortgage. (*Pendleton v. Cowling*, 11 Mont. 88, cited.)

SAME—Mortgages.—The payment by one tenant in common of a lien upon the common property does not extinguish the debt, but entitles him to contribution from his cotenant to the extent of the latter's interest.

COSTS ON APPEAL—Modification of judgment.—A tenant in common who has sought no modification of a judgment obtained against him by his cotenant in an action to enforce contribution where such cotenant had paid off a lien upon the joint property, nor offered to reimburse him to the extent of his interest, but has sought to defeat all relief in his favor, both in the trial court and on appeal, will not be allowed costs upon obtaining a modification of the judgment.

Appeal from Eighth Judicial District, Cascade County.

Foreclosure. Judgment was rendered for the plaintiff below by BENTON, J. Modified and affirmed.

Statement of the case by Mr. Justice HARWOOD.

Frank S. Lang, respondent, and John D. McIntyre, one of the defendants in this action, on December 22, 1890, executed and delivered their promissory note for seven hundred dollars, payable to M. A. Browning one year after said date, with interest, which interest was provided for by two separate interest coupon notes, payable, respectively, on June 22 and December 22, 1891. To secure the payment thereof, the makers of said notes executed and delivered to the payee, Browning, a mortgage on certain real estate situate in Cascade county, then owned in common and equal interest by said Lang and McIntyre. While said premises were subject to said mortgage, McIntyre sold and conveyed by warranty deed his interest therein to defendant Laura M. Cadwell, wife of defendant E. P. Cadwell, subject, however, by express provision of the deed, to the mortgage above mentioned. There was no other provision shown, whereby the grantee assumed or agreed to pay said mortgage debt. The interest note, due June 22d, was paid when due; plaintiff Lang and E. P. Cadwell each paying one-half thereof. When the principal sum and the remaining interest note matured, plaintiff Lang on demand paid one-half thereof, but defendants failed and refused to pay the remaining half of said mortgage debt, or any part thereof; and thereupon plaintiff Lang paid the same to relieve his interest in said land from said mortgage encumbrance, and thereupon took an assignment of said mortgage and notes to himself, and brought this action against McIntyre and wife, and Cadwell and wife, defendants,

to enforce payment of one-half of said mortgage debt, which they had failed and refused to pay.

The complaint sets forth all of the facts epitomized above; and also alleges that defendants Cadwell and wife assumed and agreed to pay half of said mortgage debt, and further alleges that said notes and mortgage provide for recovery of reasonable compensation for the services of an attorney in prosecuting an action to enforce payment of said mortgage debt, which service is alleged to be reasonably worth one hundred dollars. On the facts set forth, plaintiff Lang demands personal judgment against defendants for the recovery of half the amount paid by him to satisfy said mortgage debt, together with said counsel fees and costs, as well as foreclosure and sale of defendants' interest in said land, and application of the proceeds to the satisfaction of the judgment.

Cadwell and wife alone answered and defended. The case was tried to the court without a jury, and as a result thereof the court found for plaintiff, and rendered judgment against Cadwell and wife, personally, for one-half the amount paid by Lang to relieve said land from the burden of said mortgage debt, together with one hundred dollars for attorney's fee, and the costs expended in the prosecution of the action, and further decreed the sale of one-half interest in said premises now owned by Laura M. Cadwell, and application of the proceeds in satisfaction of said judgment according to the usual practice in such cases. Defendants Cadwell appeal, assigning the errors and irregularities noticed in the opinion.

E. P. Cadwell, for Appellants.

I. It appears from the pleadings and proof that the plaintiff is a joint maker of the note and mortgage sued upon; that he paid the same voluntarily, and without compulsion or demand; that he took an assignment of the note, in writing, to himself. Therefore he cannot maintain this action, because paying the note and taking an assignment thereof operates as a cancellation of the debt, and it thereby becomes *functus officio*, and cannot become the basis of an action or of a recovery. (*Gordon v. Wansey*, 21 Cal. 77; *Story on Promissory Notes*, § 180, 381, 384; *Burbridge v. Manners*, 3 Camp. 194; *Pomeroy's*

Remedies and Remedial Rights, 105-200; 1 Parsons on Contracts, 214, §§ 26-33; Ross on Bills, 274; *Cullow v. Lawrence*, 3 Maule & S. 97; *Heald v. Davis*, 11 Cush. 318; 59 Am. Dec. 147; *Long v. Bank of Cynthiana*, 1 Litt. 291; 13 Am. Dec. 234; *Lansing v. Gaine*, 2 Johns. 303; 3 Am. Dec. 422; *Pray v. Maine*, 7 Cush. 253; *Tucker v. Peaslee*, 36 N. H. 167; *Hopkins v. Farwell*, 32 N. H. 425; Tiedeman on Negotiable Bills, 376; Story's Equity Jurisprudence, § 499; 2 Parsons on Contracts, 358; 2 Parsons on Notes and Bills, 237; 3 Pomroy's Equity Jurisprudence, 1412; *Collier v. Irvin*, 2 Mont. 337; *Rader v. Ervin*, 1 Mont. 638; *Collier v. Field*, 1 Mont. 614; *Hosack v. Rogers*, 8 Paige, 241; 1 Jones on Mortgages, 864; *Lappen v. Gill*, 129 Mass. 349; *Ryer v. Gass*, 130 Mass. 227; *Gardner v. Maynard*, 7 Allen, 456; 83 Am. Dec. 699; *American Bank v. Doolittle*, 14 Pick. 126; *Tuckerman v. Newhall*, 17 Mass. 583; *Prince v. Lynch*, 38 Cal. 532-37; 99 Am. Dec. 427; *Armstrong v. Hayward*, 6 Cal. 185; *Goodnow v. Smith*, 18 Pick. 415; 29 Am. Dec. 600; *McCrea v. Purnort*, 16 Wend. 474.)

II. There was no proof in this case that the defendants, Laura M. Cadwell or E. P. Cadwell, had assumed or agreed to pay the said note, or any part of it, but it was contended that the deed properly construed would fix a liability upon the defendant, Laura M. Cadwell. But we submit that a purchaser of land accepting a deed expressly conveying it subject to a mortgage, and excepting it from the covenants, is not personally liable to pay it, unless he covenants so to do. (1 Jones on Mortgages, § 748-865; *Elliott v. Sackett*, 108 U. S. 132; *Shepherd v. May*, 115 U. S. 505; *Fisk v. Tolman*, 124 Mass. 254; 26 Am. Rep. 659; *Pendleton v. Cowling*, 11 Mont. 38.)

III. It is urged that the provisions of chapter lxxvi, 5th division of the Compiled Statutes, relating to joint debtors, change the rule of the common law, and were passed to remedy the rigor and import of the decision in *Collier v. Field*, 1 Mont. 614. This statute does not apply, because the plaintiff is one of the obligors, and was primarily liable for the entire debt, and when he paid the debt he but performed his contract in this note now sought to be placed in judgment; that when he took an assignment of it he, in fact and in law, paid the entire bill, not in part, but *in toto*, and that thereby the note and mortgage became *functus officio*.

IV. It cannot be urged that the doctrine of subrogation can help the plaintiff, because Lang is not a stranger to the contract, or rather is not a lienholder against the property of a different rank than his co-obligor. (See 5 Wait's Actions and Defenses, 215; 8 Am. & Eng. Ency. of Law, 864; *Rowlett v. Grieve's Syndics*, 8 Mart. (La.) 483; 13 Am. Dec. 296, and note; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783; *Doswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280; *Sandford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Fisher v. Dillon*, 62 Ill. 379; Boone's Law of Mortgages, 135; Story's Equity Jurisprudence, § 493; Daniel's Chancery Practice, 137; 1 Jones on Mortgages, § 874; 3 Pomeroy's Equity Jurisprudence, § 1419; *Lamb v. Montague*, 112 Mass. 352.)

V. The judgment and decree gives to the plaintiff an attorney's fee of one hundred dollars; there being no proof whatever to sustain this finding, it is unwarranted.

F. Atkinson, and John S. Miller, for Respondent.

The mortgagee did not accept payment of Lang's proportion of the debt, and release him and his half interest in the land. He was compelled to pay the whole amount of the debt in order to save his own interest in the land from foreclosure and sale. The authorities cited by appellants are inapplicable. The law is and always has been that a joint debtor situated as the respondent was in this case might pay off the debt, and that the mortgage would be kept alive for his protection. (1 Jones on Mortgages, 878, and cases cited in note; Tiedeman on Real Property, sec. 337; *Eads v. Rutherford*, 114 Ind. 273; 5 Am. St. Rep. 611; *Moon v. Jennings*, 119 Ind. 130; 12 Am. St. Rep. 383.

HARWOOD, J.—It very clearly appears in this case that there is no support for the judgment for recovery of attorney fees in favor of Lang. Such recovery would be allowed if supported by contract or statute. (*Bank of Commerce v. Fugua*, 11 Mont. 285; 28 Am. St. Rep. 461; *Wortman v. Kleinschmidt*, 12 Mont. 316.) But there is no statute or contract shown whereby the cotenant of Lang is obligated to pay attorney fees in an action brought by him to enforce contribution

of a portion of the mortgage debt on said land. If Lang had been compelled to pay an attorney fee to relieve said land from a portion of the encumbrance left thereon by the delinquency of his cotenant, he would be entitled to recover such attorney fees in this action for contribution, because the attorney fee would then have become part of the encumbrance which Lang was compelled to pay to relieve the land therefrom; but it appears that Lang only paid the amount of the encumbrance, without attorney fees. It does not follow, because Lang and McIntyre agreed to pay to Browning attorney fees in the event she was obliged to enforce payment of the mortgage debt by suit, that thereby either of the cotenants agreed to pay the other reasonable attorney fees for prosecuting an action to subject his cotenant's interest in said land to its proportion of the amount required to relieve the common property from the mortgage lien. Therefore, the provision of the judgment for recovery of counsel fees in favor of Lang is unwarranted, and must be struck out.

Nor was there any showing of facts to warrant personal judgment against either Laura M. or E. P. Cadwell. The conveyance of said land to Laura M. Cadwell provides simply that said land is conveyed to her subject to said mortgage. This does not support the proposition that either she or her husband personally assumed and agreed to pay one-half of the mortgage debt resting upon said land. (*Pendleton v. Cowling*, 11 Mont. 38.) And no other facts appear to support the allegation that defendants Cadwell, or either of them, assumed or agreed to pay said debt. Therefore, the provision of the judgment for personal recovery from defendants Cadwell must be eliminated therefrom.

The further exceptions urged by appellants relate to the theory on which this action was instituted and prosecuted; appellants contending that payment of the whole mortgage debt to Browning by Lang extinguished the entire debt, and therefore that Lang, one of the mortgagors, could not recover, as assignee of said mortgage and notes, one-half of the sum he paid to relieve the land from the mortgage lien. We see no reason for dwelling upon these peculiarities of the case. There is scarcely any foundation for appellants' objection in this re-

spect, even in theory. (3 Pomeroy's *Equity Jurisprudence*, 1221 et seq.) However, a judgment does not depend for support on a theory, but upon law and facts; and in this case the law and facts support the judgment in favor of Lang, to the extent of subjecting his cotenant's interest to its rightful proportion of the common burden which the cotenants had jointly placed upon said property, and which Lang was, of course, obliged to pay in full in order to relieve his half interest therefrom. "Where one tenant in common pays off a lien upon the joint property, he becomes entitled to contribution from his cotenants to the extent of their respective interests; and a court of equity will, in order to secure such contribution, enforce upon the interests of all an equitable lien of the same character as that which has been removed." (2 Beach's *Equity Jurisprudence*, § 835.)

The introduction of said mortgage and notes in evidence, with the assignment thereof to respondent, Lang, was proper, as evidence of his payment to Browning of the debt which constituted a lien on the common property, and which supported his action to subject his cotenant's interest to one-half the common burden.

It does not appear that appellants sought any modification of the judgment below, or offered to reimburse the amount paid by Lang to relieve their interest in said property from the mortgage lien, or allow said interest to be subjected to the satisfaction thereof. If appellants had so proceeded, and had then been obliged to appeal to gain a modification of the judgment, we would order costs of appeal taxed to respondent. But the proceedings show that appellants have, by their defense, sought to defeat all relief in favor of respondent, both in the court below and on appeal. Therefore, costs of appeal will not be allowed to appellants. (*Quigley v. Birdseye*, 11 Mont. 439.) The judgment will therefore be modified by eliminating therefrom the provisions for recovery of counsel fees, and the provision for recovery against defendants Cadwell personally; and with such modification the judgment is affirmed, with costs of appeal taxed against appellants.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE EX REL BYWATER v. COOK, STATE AUDITOR.

[Argued November 23, 1893. Decided November 27, 1893.]

APPROPRIATION FOR REWARDS—*Mandamus against auditor.*—The state auditor cannot be compelled by *mandamus* to draw his warrant on the fund appropriated for rewards for a given fiscal year in favor of a person entitled to such reward where the conviction of the criminals for whom the reward was offered was not had until after the expiration of such fiscal year, when such fund had been transferred to the general fund by the state treasurer as required by law.

Original proceeding. Application for writ of mandate to compel the state auditor to issue a warrant for the amount of a reward offered for the conviction of criminals. Denied.

Ella L. Knowles, for Relator.

Alex C. Botkin, for Respondent.

PEMBERTON, C. J.—The affidavit in this case states that on the twenty-ninth day of November, 1892, the passenger train of the Great Northern Railway Company was stopped and held up, and the express and baggage car attached to said train was robbed of valuable goods, etc., by three masked men near Malta in this state; that on the thirtieth day of November, 1892, Hon. J. K. Toole, the then governor of the state, by proclamation of that date, published and offered a reward of \$500 for the apprehension and delivery to the sheriff of Dawson county of the person or persons guilty of said offense; that on the first day of December, 1892, affiant procured the arrest of one of the parties guilty of said offense, and after that day one other of said parties; that said guilty parties were thereafter duly convicted of said offense and sentenced to the penitentiary of the state; that the legislature had theretofore appropriated the sum of \$2,000 for each of the fiscal years ending respectively on the first day of December, 1891, and the first day of December, 1892, for rewards. That there were in the hands of the state treasurer on the first day of December, 1892, \$2,000, subject to the payment of said reward offered by the governor; that in the months of December, 1892, and January, 1893, the state board of examiners notified the state auditor and state treasurer of the existence of this claim; that on the seventh day of January, 1893, this affiant presented his

claim for said reward to the state board of examiners and demanded the payment thereof; that subsequently thereto the state treasurer transferred the whole of the appropriation for rewards for said year into the general fund of the state; that on the twenty-second day of June, 1893, the state board of examiners, upon proper proofs and showing, allowed and approved of said claim of said affiant for said reward in the sum of \$500, and ordered the same paid out of the appropriation for rewards for the year 1892; that on the same day the state board of examiners notified the state treasurer in writing to transfer to the fund designated as rewards the sum of \$500 out of any money in the treasury not otherwise set apart, to the credit of the reward fund for the purpose of paying this claim; that the respondent is the auditor of the state; that on said twenty-second day of June, 1893, this claim was duly presented to said auditor, who refused to draw his warrant therefor, but returned it indorsed "Returned. No funds. A. B. Cook, state auditor"; that said auditor still refuses to draw said warrant; that there is now in the hands of the state treasurer the sum of \$500 to pay said reward.

From the foregoing statement, it will be seen that the relator seeks to compel the state auditor by writ of mandate to issue his warrant on the fund appropriated for rewards for the fiscal year 1892, for the payment of his claim. From the affidavit in this case it appears, that when the fiscal year of 1892 expired the affiant had no legal demand against the state.

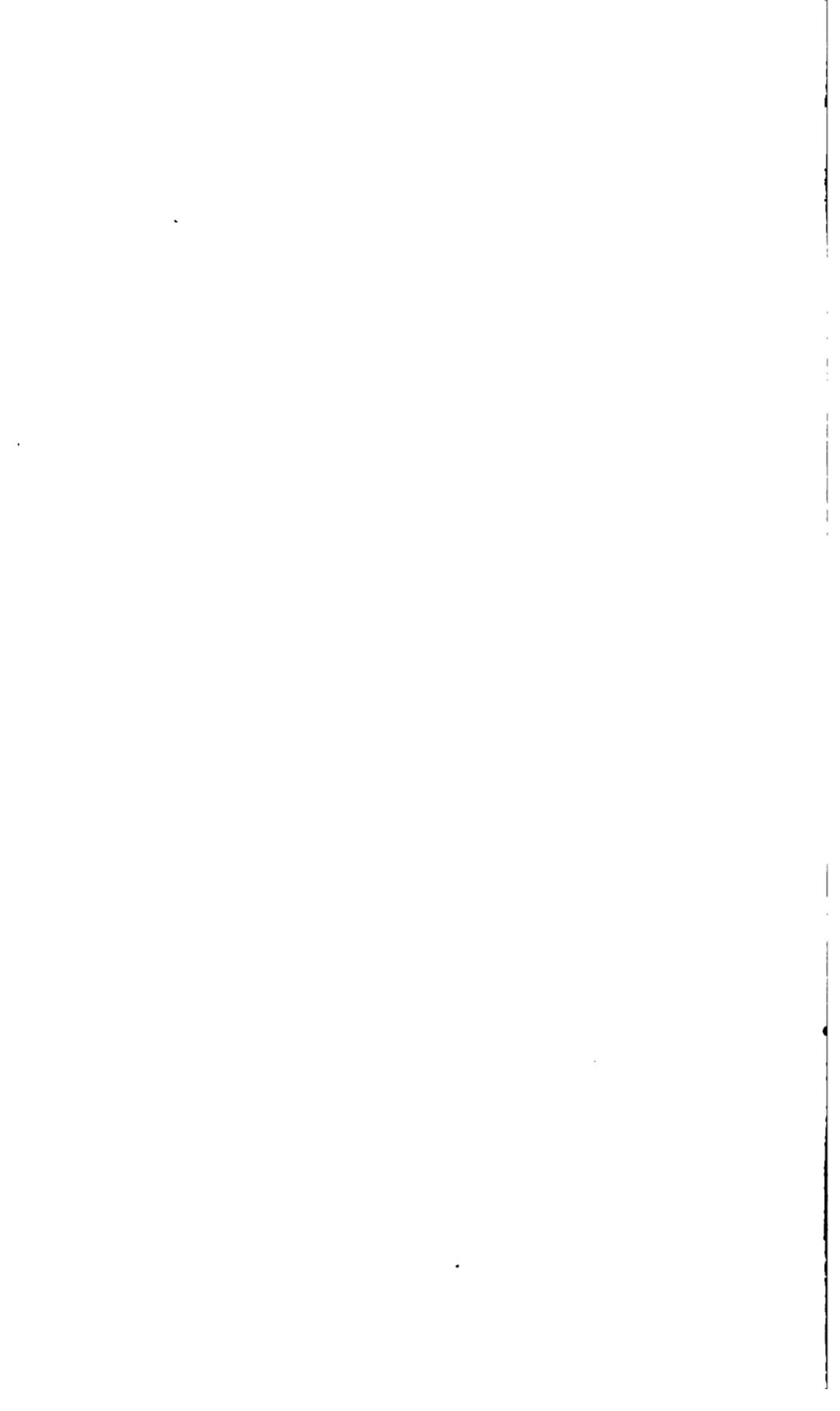
No liability on the part of the state accrued to pay this reward until after the conviction of the parties for whose apprehension and delivery to the authorities the reward was offered. (Comp. Stats. 1887, § 287, 4th div.) It appears from the affidavit herein that such conviction was not had until after the expiration of the fiscal year 1892. The affiant's claim was not allowed by the state board of examiners until the twenty-second day of June, 1893. At that time the reward fund for the year 1892 had been transferred to the general or unused fund by the state treasurer as required by law. We think this was not a claim chargeable to the reward fund appropriated for the year 1892, which expired on the first day of December of that year, and therefore are of the opinion that the auditor can

not be legally required to draw his warrant on said fund for the year 1892. When the fiscal year 1892 expired, the relator had only a contingent or conditional demand upon the state for this reward. His claim depended upon the apprehension and conviction of the parties guilty of the crime for which the reward was offered. These conditions were not fulfilled and complied with until after the expiration of the fiscal year 1892. The conviction of these parties might not have been secured for five or ten years. In such case could this reward be held to be a demand against the reward fund for the year 1892, and the auditor be required to draw his warrant on that fund for that year merely because a reward was offered in that year? We think not.

We think this case very different from a case where a specific appropriation has been made for a certain year for the erection of a state building, and such building has not been completed within the fiscal year for which the fund has been appropriated. In such case we think the fund has been, in contemplation of law, put to use or virtually expended when the authorized state agents have contracted for the construction of such building. Although said state agents may in fact hold the fund appropriated, or a part thereof, in the hands of the treasurer to secure the fulfillment of the contract for the erection and completion of the same. We see no good grounds for the alarm expressed by counsel in this case as to the effect the holding in this case will or may have on the unexpended funds of any specific appropriation remaining in the treasury at the expiration of any fiscal year. It will be time enough to determine the fate of these appropriations when an occasion shall arise for so doing.

The writ of mandate is denied.

HARWOOD, and DE WITT, JJ., concur.



CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1893.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.
Hon. EDGAR N. HARWOOD,
Hon. WILLIAM H. DE WITT, } Associate Justices.

McCORMICK, RESPONDENT v. GLIEM, APPELLANT.

[Submitted October 8, 1893. Decided December 4, 1893.]

Witnesses—Cross-examination.—In an action for the recovery of the possession of land, and the value of rents and profits during the period of wrongful detention, plaintiff cannot properly be cross-examined as to information concerning the use which had been made of the premises, where the direct examination related only to the stipulations of an agreement whereby the premises were leased.

Appeal from Fourth Judicial District, Missoula County.

Ejectment. Judgment was rendered for plaintiff below by WOODY, J. Affirmed.

George B. Wilds, for Respondent.

HARWOOD, J.—Action in the nature of ejectment for recovery of possession of certain real estate, and the value of

rents and profits thereof during the period of wrongful detention. Plaintiff, by her complaint in the usual form, alleges description and ownership of the real property in question, and her right to immediate possession thereof since May 1, 1892, the value of rents and profits thereof, and that since said date defendants have wrongfully held possession of said property; wherefore judgment is demanded for the recovery of possession, and the value of the rents and profits during the period said premises were wrongfully withheld.

After disposing of a demurrer and certain motions to strike out parts of the pleadings, issue was joined by the answer of defendant Gliem. The other defendants made default. Thereupon trial was had to the court, a jury having been waived. At the close of the trial the court found the plaintiff entitled to recover possession of the premises in question, together with the rents and profits thereof during the period of unlawful detention, in the sum of nine hundred and forty dollars, and caused to be entered judgment for the recovery accordingly, from which judgment defendant Gliem appealed to this court.

This appeal was submitted, by stipulation of counsel, without argument, and appellant has failed to file any brief directing the attention of this court to the points and authorities relied upon to reverse or modify the judgment; but counsel for respondent has filed a brief in support of the judgment. An examination of the judgment-roll discloses to our view no errors or irregularities. There appears, however, attached to the judgment-roll a statement of the case containing specifications to the effect that the court erred: 1. In overruling defendant's demurrer to the complaint; 2. That the judgment is contrary to law; 3. That the judgment is not sustained by the evidence; and 4. That the court erred in overruling certain questions propounded to plaintiff on cross-examination.

The questions, objections, ruling of the court, and exceptions referred to in the last specification of error, appear in the statement of the case. There is no apparent support for any of these assignments of error. No particulars are specified as to the first three, and the record shows that they are without merit. As to the fourth assignment, the ruling of the court in sustaining objections to the questions specified was based

upon the ground that the questions were not within the scope of cross-examination, and the court was correct in its ruling. The direct examination related to the conditions or stipulations of an agreement, whereby certain lots were leased, and that was the only inquiry made on direct examination; whereas the cross-examination sought to go into an inquiry as to general information, and sources of information, of the witness concerning the use which had been made of the premises in question; and these inquiries, to which objection was sustained by the court, were clearly not cross-examination.

Judgment is affirmed, with costs. *Remittitur* forthwith.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

13	471
14	77
34*	846
35*	227
13	471
126	872

DOYLE, APPELLANT, v. GORE ET AL., RESPONDENTS.

[Argued October 8, 1893. Decided December 4, 1893.]

APPEAL—Diminution of record—Amendments to statement.—A motion to strike from the files a supplemental transcript showing amendments to a statement on motion for a new trial, filed upon the granting of a motion for an order to supply amendments alleged to have been omitted from the original statement, will be denied where there is a dispute as to whether or not such amendments, are contained in the original statement, for if they are, the appellant could not be prejudiced by their duplication, and if not, the respondent is entitled to their benefit.

SAME—Statement on motion for new trial—Time of service.—A statement on motion for a new trial which is served more than thirty days after an order extending the time of service, although within the period of a subsequent extension which was granted without the consent of the adverse party, will be stricken from the files under section 536 of the Code of Civil Procedure, prohibiting the extension of the statutory time for the preparation of a statement on motion for a new trial to a greater period than thirty days without the consent of the adverse party.

Appeal from Eighth Judicial District, Cascade County.

Plaintiff's motion for a new trial was denied by BENTON, J.

On appeal appellant's motion to strike supplemental transcript from the files was denied, and respondents' motion to strike the statement on motion for a new trial from the record was granted.

Thos. E. Brady, for the motion.

The order of the trial judge made on May 28th, extending appellant's time to prepare and serve his proposed statement on motion for a new trial to June 21, 1892, was void at least to the extent of time lapsing after June 5th, the last day allowed by law for such service, granting him the full limit of time, and so was the order made on June 18, 1892, entirely void, because it was made after the court had by limitation lost jurisdiction over the entire proceedings on appeal. (*Caney v. Silverthorne*, 9 Cal. 67; *Lafferty v. Brownlee*, 11 Cal. 132; *Easterby v. Luroo*, 24 Cal. 180; *Leech v. West*, 2 Cal. 95; *Munch v. Williamson*, 24 Cal. 170; *Bear River & A. W. Co. v. Boles*, 24 Cal. 357; *Jenkins v. Frink*, 27 Cal. 337; *Le Roy v. Rasselle*, 32 Cal. 171; *Campbell v. Jones*, 41 Cal. 517; *Cottle v. Leitch*, 43 Cal. 322; *Mott v. Foster*, 45 Cal. 72; *Chase v. Evoy*, 58 Cal. 351; *Clark v. Crane*, 57 Cal. 630.)

Donovan & Lyier, contra.

PER CURIAM.—This case is appealed to this court from the judgment, and from an order of the trial court overruling plaintiff's motion for a new trial. Certain motions have been interposed by both parties concerning the record on file herein. The first by respondents, suggesting a diminution of the record, and moving this court for an order to supply certain amendments of the statement on motion for new trial and a bill of exceptions, which respondents claim were omitted in making up the record now on file here. This motion is accompanied by an affidavit setting forth that certain amendments were proposed, and allowed, and ordered to be incorporated in the record by the trial judge, and that a bill of exceptions was also made by respondents, all of which have been omitted from the record. Thereupon respondents' motion was granted, and, in compliance with the order made, the clerk of the trial court has certified to this court a supplemental record, containing the amendments which appear to have been proposed to the statement on motion for new trial, and allowed by the trial court in the settlement of said statement, and ordered to be incorporated therein. Upon the filing of said supplemental transcript, appellant's counsel interposed a motion to strike the

supplemental record from the files of this court, on the ground that the original statement on motion for new trial contained all the amendments proposed by respondents and allowed by the trial court on the settlement of the statement on motion for new trial. The respondents insist, on the contrary, that the original statement does not contain such amendments, and the certificate of the clerk and judge of the trial court attached to the supplemental record appear to support respondents in this contention.

In our opinion, this motion to strike said supplemental record from the files should be denied. If the amendments in question were incorporated in the original statement on motion for new trial, as appellant contends, the appearance of the same matter in the supplemental record will introduce nothing new, but will show a mere duplication of the matter, and no injury or inconvenience can result to appellant therefrom. While, on the other hand, if any such amendments as were allowed by the trial court are omitted from the original statement, as contended by respondents, they should have the benefit of the same in the supplemental record.

The next point for consideration is the motion of respondents to strike from the record the statement on motion for new trial, on the ground that the same was not prepared and served within the time required by statute. It appears from the statement on motion for new trial, as settled and allowed, that the trial closed and judgment was rendered April 21, 1892. Thereupon plaintiff, against whom the judgment was rendered, made and served notice of intention to move for new trial, within the time prescribed by statute, April 26, 1892; and the court, on April 28, 1892, on motion of plaintiff, extended the time for preparation and service of statement on motion for new trial thirty days from said date. It further appears from the record that on May 28th, on motion of appellant, the trial court again extended the time for preparation and service of said statement, to June 21, 1892; and on June 18, 1892, another order was made by the court, extending the time for the preparation of said statement to June 24, 1892. The statement on motion for new trial was served June 23, 1892. These extensions aggregate fifty-eight days. The first order of extension of time recites that the same was made "without

the consent, advice, or stipulation of defendants or their counsel." Nor does it appear that any of the other orders for extension of time were made by consent of respondents or their counsel. Respondents now move this court to strike out said statement, because of this showing that time was extended more than thirty days without consent of adverse party; relying on § 536, Code of Civil Procedure, which provides that such extension shall not exceed thirty days without consent of adverse party.

The position of respondents must be sustained. The statement on motion for new trial is therefore stricken from the record, leaving the case for consideration of the judgment-roll on the appeal from the judgment.

ON REHEARING.

DE WITT, J.—The argument upon rehearing in this case has presented nothing which was not considered on the first hearing. The argument was simply a reiteration of the points passed upon in the original decision.

Counsel call our attention to the case of *Moe v. Northern Pac. R. R. Co.*, 2 N. Dak. 282, as being in point. In that case the North Dakota court had under consideration section 5093 of the Compiled Laws of North Dakota, which is as follows: "The court or judge may upon good cause show in furtherance of justice, extend the time within which any of the acts mentioned in sections 5083 and 5090 may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done."

From that case counsel quote as follows: "That the authority conferred by said section to extend the time to settle a bill of exceptions and statement after such statutory period for so doing has expired is not absolute, but such discretion is a sound judicial discretion."

The decision is not in point, and the industry displayed in counsel's brief of this case ought to have shown them that the Dakota cause was not applicable; for the Dakota statute does not provide, as does ours, that such extension shall not exceed a given number of days named by the statute, beyond the time prescribed, without consent. (Code Civ. Proc., § 536.)

Counsel again dwell upon section 298, subdivision 3, Code

of Civil Procedure, in connection with section 536. Those sections, read together, provide as follows: "The party moving for a new trial must, within ten days after the service of notice of intention to move, or such further time as the court or judge may allow, prepare a draft of the statement," etc. (§ 298, subd. 3.) "But such extension so granted by the court or judge shall not exceed thirty days beyond the time prescribed by this act, without the consent of adverse party." (Code Civ. Proc., § 536.)

The whole provision, therefore, is that the statement must be served within ten days, or such further time as is allowed (not exceeding thirty days) unless there be a consent of parties.

It was said in the Dakota case cited above: "The statutory time limited for giving a notice of intention, and for having bills of exceptions and statement settled, is ordinarily ample for the purpose. It rarely happens that further time is necessary."

So, in our practice, if the party preparing a statement takes the limit, as he may, of all the periods allowed him by statute, and the extensions by the court, he has ample time in which to prepare his statement. For, to commence with, he has ten days after the verdict of the jury to file and serve his notice of intention. (Code Civ. Proc., § 298.) He then has ten days after the service of this notice to serve his statement. (Code Civ. Proc., § 298, subd. 3.) Then, again, the court or judge may extend the time for thirty days more. This gives an aggregate of fifty days.

Counsel again contend that the record does not disclose that the extensions of time were given in the absence of defendants or their counsel, thus arguing that they were impliedly by the consent of the parties. (Code Civ. Proc., § 536.) But, as noticed in the original decision, the first order of extension appears by the record to have been made "without the consent, advice, or stipulation of defendants or their counsel," and it does not appear that any of the further extensions were by consent, and the statute provides that, unless they were by consent, they are prohibited. (Code Civ. Proc., § 536.)

It is our opinion that the original decision should remain as the judgment of this court, and it is so ordered.

PEMBERTON, C. J., and HARWOOD, J., concur.

13	476
14	185
34*	1017
25*	959
13	476
18	290
18	291
18	292
18	293
13	476
34	218

COLBURN, RESPONDENT, v. NORTHERN PACIFIC RAILROAD COMPANY, APPELLANT.

[Argued, November 28, 1893. Decided, December, 4, 1893.]

NORTHERN PACIFIC GRANT—Decision of secretary of interior—Collateral attack.—The decision of the secretary of the interior that certain land was not included within a grant to the defendant corporation is conclusive until reversed in a direct proceeding for that purpose, and cannot be collaterally attacked in an action to recover the purchase price of the land by one to whom it had been conveyed by the defendant.

VENDOR AND VENDEE—Contract to convey—Breach.—A contract by the vendor of land to make and deliver a deed to the vendee that "shall convey the said premises," is not complied with by the mere delivery of a warranty deed so as to prevent the recovery of the purchase money paid under the contract where it is subsequently determined that the vendor had no title to convey.

SAME—Contract to convey—Breach and remedy.—A vendee who has accepted a deed from a vendor who is afterwards found to have had no title to convey is not compelled to await an ouster and then sue on the covenants of the deed, but may sue to recover the money paid on a contract for the purchase of the land.

Appeal from Ninth Judicial District, Gallatin County.

Action to recover purchase price of land. Plaintiff's demurrer to the answer was sustained by ARMSTRONG, J. Affirmed.

Statement of facts prepared by the justice delivering the opinion.

This action is brought to recover five hundred and sixty-seven dollars and forty cents, with interest, paid by respondent to appellant upon a certain contract for the sale of lands. The complainant alleges the corporate existence of the appellant under the act of Congress approved July 2, 1864; the grant of lands made to appellant by that act of Congress; the entering into a contract by appellant with one Nathan Frost to sell, convey, and transfer the north half of the southeast quarter, of section 23, township 3 south, of range 4 east, Gallatin county, Montana, to said Frost; the subsequent transfer of the contract to respondent; and the compliance with its conditions by respondent and his predecessors in interest, including the payment of the purchase price of said land, the total amounting to five hundred and sixty-seven dollars and forty cents. The complaint also alleges that appellant neither has nor can con-

vey any title to said land, or any part thereof, as covenanted in said contract, and that on the twenty-fourth day of January, 1891, the secretary of the interior held that the said land did not pass to the railroad company under its grant, but remained public land; and further alleges that in the year 1891 a patent for the said land was issued by the United States to respondent. It then alleges the demand for the return of the purchase price of the land paid under the contract, and the refusal of the defendant to return the same.

The answer admits the corporate existence of appellant, and sets up the grant of lands made to appellant by the act of congress approved July 2, 1864. It alleges that the railroad company fixed the line of its general route through the territory of Montana, February 21, 1872, and, having located its line of definite location, fixed the same by filing a plat thereof in the office of the commissioner of the general land office, July 6, 1882. It then alleges that the land in controversy was on and within forty miles of the line of the road, so definitely fixed as aforesaid. It also alleges the subsequent completion of the road, as required by the act of July 2, 1864, and its acceptance by the president of the United States; such completion and acceptance being prior to the contract of sale mentioned in the complaint. It admits the existence of a homestead entry on the land, January 28, 1871, which entry was canceled on or about December 3, 1872, having been relinquished by Anna McCarty, the entryman. It also admits that a declaratory statement was filed for this land December 29, 1874, by one Nathan Farnham, but sets up that thereafter, and long prior to July 6, 1882, Farnham had abandoned the land, if, indeed, he ever settled thereon; that there were no other entries or filings, or application to make entry or filing, upon said lands whatsoever, prior to July 6, 1882, and that the said land was on July 6, 1882, public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, as set forth in said answer; and that said land was, and at all times has been, non-mineral land. It admits the making of the contract with said Nathan Frost on January 16, 1886, and sets forth said contract in full. It admits the assignment of said

contract to said respondent, and sets up that, on the compliance with the terms of the contract by respondent and his predecessors in interest, the said appellant made, executed, and delivered to said respondent its deed, wherein and whereby it duly conveyed the title to said land to said respondent, as in and by said contract it had agreed to do; and that in and by said deed, said defendant covenanted and agreed to and with said respondent, his heirs, and assigns, that it shall and will warrant and defend the title to said granted premises unto the said plaintiff, his heirs, and assigns, forever, against the lawful claims of all persons whomsoever, excepting for taxes and assessments. It then sets up the application to enter the land by one John R. Foster, the respondent's immediate grantor, under the claim that the land was excepted from the grant to the Northern Pacific; the ordering of a hearing on said application, by the commissioner of the general land office; the decision by the register and receiver of the United States district land office at Bozeman, Montana, made thereon during the year 1888; the appeal taken from said decision to the commissioner of the general land office; the decision of the commissioner of the general land office, made in February, 1889, holding said land to be excluded from said grant to the Northern Pacific; the appeal by the company from that decision to the secretary of the interior; and the decision of the secretary, adverse to the company, made December 12, 1890, setting forth said decision in full. It denies, from lack of information and belief, that any patent has been issued for the land to the respondent or any one else. It sets up that the land was non-mineral public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at all times mentioned in the answer, except as particularly set forth in said answer. It denies that the respondent has been ousted or disturbed in his possession, or that his title has been impaired or assailed in any manner whatsoever, or that there has been any breach of warranty contained in said contract and deed; and denies that there is any amount due from appellant to respondent, or that respondent has suffered any injury. It also sets up the fact that the respondent knew, long prior to the time of the assignment of

the contract to him by said Foster, of the said pretended claim that the land was excepted from the grant to the Northern Pacific, and was not the property of the company. To this answer respondent demurred upon the ground that it did not state facts sufficient to constitute a defense. The court below, after hearing, sustained the demurrer. Appellant declining to amend, judgment was entered in favor of respondent, November 14, A. D. 1892. From the order sustaining said demurrer, and from the judgment entered in said cause in favor of respondent, this appeal was duly taken.

W. E. Cullen, and Fred M. Dudley, for Appellant.

L. To entitle respondent to recover there must have been a breach of the agreement "to make, execute, and deliver a good and sufficient warranty deed." No such breach is alleged. The contract alleged refers merely to the validity and sufficiency of the deed in point of law to convey whatever right respondent had in the premises, and not to the title thereby conveyed. And even admitting the averment that appellant neither has nor can convey title, to be well pleaded and true, it does not show a breach of the contract. (*Preston v. Whitcomb*, 11 Vt. 47; *Van Eps v. Schenectady*, 12 Johns. 436; 7 Am. Dec. 330; *Gazley v. Price*, 16 Johns. 267; *Parker v. Parmele*, 20 Johns. 130; 11 Am. Dec. 253; *Aiken v. Sanford*, 5 Mass. 494.) The contract was not to convey a specific title, the one the company might receive under its grant; and conceding that the secretary held the land described was excluded from appellant's grant, and further conceding that such decision was correct, and final, it by no means follows that appellant cannot or has not fully complied with the contract and conveyed the title to the land to respondent by a "good and sufficient warranty deed." Nor is the averment that a patent has been issued to respondent necessarily inconsistent with a perfect performance by appellant of its contract. A patent is but a quitclaim deed from the United States, and if the government had already parted with the title it conveys nothing. (*Wright v. Roseberry*, 121 U. S. 518 et seq.; *Doolan v. Carr*, 125 U. S. 624; *Steel v. Smelting Co.*, 106 U. S. 452, 453; *Smelting Co. v. Kemp*, 104 U. S. 641; *Miller v. Tobin*, 16 Or.

540; *Iron Silver M. Co. v. Campbell*, 135 U. S. 286; *Francoeur v. Newhouse*, 40 Fed. Rep. 623; *Northern Pac. R. R. Co. v. Wright*, 51 Fed. Rep. 71.)

II. Nor is the averment that the secretary of the interior has decided the land was open public land of the United States, subject to entry, sufficient to show a breach of the contract. If the land be not public the secretary has no jurisdiction. (*Moore v. Robbins*, 96 U. S. 533; *United States v. Schurz*, 102 U. S. 402; *Tubbs v. Wilhoit*, 138 U. S. 145, 146; *Hardin v. Jordan*, 140 U. S. 400; *Doolan v. Carr*, 125 U. S. 624.) The determination of the secretary alleged was simply a determination as to his own jurisdiction. The interior department is a tribunal of limited jurisdiction. A general averment of jurisdiction in such case is insufficient. (Wells on Jurisdiction of Courts, secs. 40, 41; *People v. Koeber*, 7 Hill, 41; *Board of Commissioners v. Markle*, 46 Ind. 111; *State v. Ely*, 43 Ala. 575; Lawson on Presumptive Evidence, 27, 29.) If the secretary had no jurisdiction his decision is void for all purposes, and in the absence of the allegations of fact showing such jurisdiction it cannot be presumed. In *Northern Pac. R. R. Co. v. Amacker*, 53 Fed. Rep. 52, Judge Knowles says: "The ruling of the land department does not determine the right to, or ownership of, land when the government has parted with the same, but only as to whether the government should issue or not a patent to the land claimed by the applicant." (See, also, *Northern Pac. R. R. Co. v. Wright*, 51 Fed. Rep. 71; *Iron Silver M. Co. v. Campbell*, 135 U. S. 292, 293, 294; *Wright v. Roseberry*, 121 U. S. 518 et seq.; *Miller v. Tobin*, 16 Or. 540; *Stimeon v. Clarke*, 45 Fed. Rep. 760; *Megerle v. Ashe*, 33 Cal. 83, 89.)

III. Respondent having accepted a deed cannot now recover on the contract. His remedy, if any, is on the covenant in the deed. Appellant complied with the contract sued upon by giving a deed with covenants of warranty as it agreed to do; and the respondent accepted such deed in satisfaction of appellant's agreement. Having accepted the deed in satisfaction of the contract, and retaining every advantage acquired under the contract and deed, he cannot now question the sufficiency of appellant's compliance therewith and demand the

return of every consideration moving from himself. The law will not permit him to play fast and loose; blow hot and cold. (Herman on Estoppel, sec. 1039, 1041.) Respondent could not rescind this contract, even if the deed had not been made, and recover the consideration paid without first placing appellant in *status quo*. Much the less can he retain the deed conveying appellant's claim, title, and interest, whatever it may be, and yet so rescind the executed contract and recover. (*Fay v. Oliver*, 20 Vt. 123; 49 Am. Dec. 764; *Caswell v. Black River etc. Mfg. Co.*, 14 Johns. 453; *Fuller v. Hubbard*, 6 Cow. 13; 16 Am. Dec. 423; *Gale v. Nixon*, 6 Cow. 445.) Respondent's right of action, if he have one, must now be upon the covenants of warranty contained in the deed; having elected to accept the deed, he must abide by the remedies given therein. (Waterman on Specific Performance, sec. 418; *Patton v. Taylor*, 7 How. 133; *Bryan v. Swain*, 56 Cal. 616; *Davenport v. Whisler*, 46 Iowa, 287; *Clifton v. Jackson Iron Co.*, 16 Am. St. Rep. 622, note; *Shontz v. Brown*, 27 Pa. St. 123; *Godding v. Decker* (Col. App., March 27, 1893), 32 Pac. Rep. 832; *Bell v. Keepers*, 39 Kan. 105; *Harvey v. Morris*, 63 Mo. 475; *McIndoe v. Morman*, 26 Wis. 588; 7 Am. Dec. 96; *Keater v. Colorado Coal etc. Co.* (Col. App., March 27, 1893), 32 Pac. Rep. 857; *Dennis v. Jones*, 44 N. J. Eq. 513; 6 Am. St. Rep. 899; *Garrett v. Lynch*, 44 Ala. 324; *Martin v. Chambers*, 84 Ill. 579; *Schneider v. Foote*, 27 Fed. Rep. 581; *Farwell v. Hanchett*, 120 Ill. 573; *Dillman v. Nadlehofer*, 119 Ill. 567; *Doane v. Lockwood*, 115 Ill. 490; *Turner v. Cruzen*, 70 Iowa, 202; *Potter v. Taggart*, 59 Wis. 1; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Gates v. McLean*, 70 Cal. 42; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Atchison etc. R. R. Co. v. Starkweather*, 21 Kan. 322.)

Staats & Holloway, for Respondent.

I. The contract with the appellant company in this case was for the title to the land; not for a deed alone, or for whatever interest, if any, the appellant company had in the land. The object in bargaining for "a good and sufficient deed of conveyance" was to obtain a good title to the land. (*Thayer v. White*, 3 Cal. 229; *Clute v. Robison*, 2 Johns. 611.) The question is, did the defendant railroad company comply with the

terms of the contract as to those matters by it to be kept and performed? 1. Did it sell the land in question to Frost or his assignees? or 2. Did it convey title to its grantee, Frost, or his assignees? There must be subject matter (consideration) to constitute a valid sale or conveyance, and the lack of it invalidates the sale. "For if that for which the contract was made proves a nullity the contract becomes void." (Bishop on Contracts, § 71; *Jeffries v. Lamb*, 73 Ind. 202; *Snyder v. Kurtz*, 61 Iowa, 593; *Riddell v. Blake*, 4 Cal. 264; *Thayer v. White*, 3 Cal. 228.) The allegation of the inability of the appellant railroad company to convey any title for want of some title to convey, is an allegation of the breach of the contract on the part of the defendant. (Bishop on Contracts, § 70.)

II. The land department is the tribunal to decide questions relating to the proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and its decision on matters of fact, in the absence of fraud or imposition, is conclusive everywhere else. Only where it has clearly mistaken the law of the case as applicable to the facts, can its judgment be assailed, and then only by direct proceedings. (*Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Shepley v. Cowan*, 91 U. S. 330.) The decisions of the land department on all disputed questions of fact, when assailed collaterally, must be taken as conclusive. (*Shepley v. Cowan* 91 U. S. 330; *Boyce v. Danz*, 29 Mich. 146; *Steel v. St. Louis S. & R. Co.*, 106 U. S. 447; *Baldwin v. Stark*, 107 U. S. 463.) The appellant cannot be heard to attack the ruling of the land department collaterally, as it is trying here to do. But if it could so attack it, its efforts in that direction in this case are fruitless. The pleadings settle that at the date of withdrawal, on filing map of general route February 21, 1872, this tract of land was covered by the filing of Anna McCarty, which excepted it from the operation of that withdrawal. (*United States v. Burlington etc. R. R. Co.*, 98 U. S. 334.)

III. There is no allegation in the answer of the acceptance by the plaintiff of the deed; on the contrary it appears that he did not accept it, but repudiated it, and demanded his money immediately on the discovery that the defendant had no title to the land. It is true there is no allegation of a return of the

deed, but even supposing it was not returned, was it necessary for plaintiff to return the deed or give up possession of the property in order to sue for breach of the contract? If the defendant had no title to the land its deed conveyed none and was worth only the paper upon which it was written. In order that the defendant be put in *statu quo* it is only necessary for plaintiff to return whatever of any value to himself or the other he has received under the contract, yet he need not include in this what is without possible benefit. (*Herman v. Haffenegger*, 54 Cal. 161; *Lane v. Latimer*, 41 Ga. 171; *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Underwood v. West*, 52 Ill. 397.) The pleadings show that the plaintiff derived no advantage whatever from the deed, in that it conveyed no title, and appellant was in the same position relative to the land in question after the delivery of the deed to the plaintiff below as before. It lost no interest in the land by the deed, for it never had any. It was in *statu quo*. Neither was it necessary for plaintiff to give up possession of the property, or be ousted from possession, in order to recover on the contract. In *Marshall v. Caldwell*, 41 Cal. 611, the grantor assumed to have title to the whole tract of land, while, as a matter of fact, he owned but one-half, and the grantor was not permitted to say that he sold less than the whole title to the land, and upon the discovery by the vendee that the vendor had not what he contracted to convey the vendee could rescind the contract. In the case at bar the contract falls for want of subject matter, and the vendee is not required to surrender possession of the property before he can maintain an action for the recovery of the purchase money. (*McCracken v. City of San Francisco*, 16 Cal. 593; *Herzo v. City of San Francisco*, 33 Cal. 134.)

PEMBERTON, C. J.—The question for this court to determine is whether or not the answer in this case states facts sufficient to constitute a defense to the action. The answer admits the material allegations in the complaint, and seeks, in a measure, to state facts in avoidance. After pleading *in extenso* the proceedings in the land department, and the contest and decision therein, in relation to the land mentioned in the pleadings, the appellant seeks in this case to retry the facts

upon which the case was tried in said land department, and to attack the judgment of the secretary of the interior on the respondent's appeal in said controversy.

We are of the opinion that the decision of the secretary of the interior pleaded in this case is final and conclusive until reversed in a direct proceeding for that purpose, and cannot be collaterally attacked in this action. In speaking of the decisions of the land department in such cases, in *Steel v. Smelting Co.*, 106 U. S. 447, Mr. Justice Field, delivering the opinion of the court, says:

"In *Johnson v. Towsley*, 13 Wall. 72, the effect of the action of that department was the subject of special consideration; and the court applied the general doctrine 'that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others'; and said, speaking by Mr. Justice Miller: 'That the action of the land office in issuing a patent for any of the public land subject to sale by pre-emption, or otherwise, is conclusive of the legal title must be admitted under the principle above stated; and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained.'

"In *French v. Fyan* a patent had been issued to the state of Missouri for swamp and overflowed land, under the act of September 28, 1850, chapter 84. In an action of ejectment by a party claiming title under a grant to a railroad company, which would have carried the title if the land were not swamp and overflowed, parol testimony was offered to prove that it was not land of that character, and thus to impeach the validity of the patent. The court below held that the patent concluded the question, and rejected the testimony. The case being brought here, the ruling was sustained. This court, speaking through Mr. Justice Miller, said: 'We are of opinion that in this action at law it would be a departure from sound principle, and contrary to well-considered judgments in this court and in others of high authority, to permit the validity

of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.' (93 U. S. 169, 172.)

"In *Quinby v. Conlan* (decided at the last term) we said: 'It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, *in a proper proceeding*, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled.' (104 U. S. 420, 426. See, also, *Vance v. Burbank*, 101 U. S. 514.) . . . So with a patent for land of the United States, which is the result of the judgment, upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy, with respect to the land, no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation." (See *Silver Bow Mining and Milling Co. v. Clark*, 5 Mont. 378.) There seems to be no conflict in the authorities on this point.

The appellant insists that it complied with its contract by executing and delivering to respondent its deed to the land in accordance with the terms of its contract of sale. The appellant's contract required it to make and deliver a deed to the respondent, and stipulated that "the said deed shall convey the

said premises to the original purchaser or purchasers, or, at the option of the said party of the first part, to the lawful and duly appointed assigns of such purchaser or purchasers." The appellant contracted to deliver to the purchaser of the land not merely a deed in legal form, but such a deed as would convey the title to said land.

In section 414, Waterman's Specific Performance of Contracts, we find the doctrine to be stated thus: "As a general rule, it makes but little difference what the precise terms of the contract are, whether the vendor agrees to make title, or a good title, or to make a deed or a warranty deed, if it appears that he is negotiating to sell at a sound price, to be paid or part paid at the conveyance. In such cases, usually, the vendor, without a nice examination of words, is understood to agree to furnish a good title, and the vendee cannot be put off with merely a good' deed. . . . An agreement to give a 'good deed' is not simply a promise to execute a deed in legal form with proper warranty, but a deed good and sufficient both in form and substance to convey a valid title to the land." And see authorities cited in note to this section.

Did the appellant execute and deliver to respondent such a deed as conveyed the title to the land it contracted to deed? We think not. By appellant's own showing the land department had decided that it had no title, and, as a matter of course, it did not convey, and could not convey, any title to the land by the deed it executed and delivered to respondent.

Nor do we think that the position assumed by appellant, that respondent, having accepted the deed from appellant, was compelled to wait until he was ousted, and then sue on the covenants of the deed, is tenable. The respondent got nothing by the deed from appellant. When it was determined by the proper tribunal, as is the case here, that appellant had no title to the land, and could not comply with its contract to convey the title, then and there was a breach of its contract that authorized respondent to sue, without being ousted or surrendering possession of the land or deed. (*Marshall v. Caldwell*, 41 Cal. 611; *Stone v. Fowle*, 22 Pick. 166.) We are of the opinion that the answer did not state facts sufficient to constitute a defense.

The order of the court sustaining the demurrer to the answer was correct, and the judgment for the respondent is therefore affirmed.

Affirmed.

HARWOOD and DE WITT, JJ., concur.

13	487
92	510
13	487
28	155

FERGUSON, APPELLANT, v. SPEITH ET AL., RESPONDENTS.

[Argued January 26, 1893. Decided December 11, 1893.]

HOMESTEAD—Partnership property—Exemption.—A partner is entitled as against the creditors of the firm to claim and hold a homestead in the partnership estate, under section 322 of the Code of Civil Procedure exempting a homestead, to be selected by the owner, from forced sale on execution or other final process. (*Lindley v. Davis*, 7 Mont. 206, reviewed.)

Appeal from Ninth Judicial District, Gallatin County.

Ejectment. The cause was tried before ARMSTRONG, J., without a jury. Defendants had judgment below. Affirmed.

Statement of the case prepared by the justice delivering the opinion.

It appears from the record in this case that in the year 1867 respondent Jacob F. Speith and one Charles Krug entered into copartnership in the brewing business in Bozeman, in this state; that Speith put into said business the sum of three thousand five hundred dollars, Krug failing to contribute any thing in cash; that in April, 1873, said partners purchased the property in dispute with partnership funds; that in May of that year Speith with his family took possession of the premises and has occupied them ever since with his family as a home and now so occupies them.

Krug, the other copartner, also occupied a room in said dwelling-house, and it appears that the employees of the firm boarded at the table which was maintained in said house, at the expense of the partnership firm. Krug died, and the partnership assets were attached, the title of said property standing in the name of the firm. Said property was attached and sold under certain executions in May, 1890, and plaintiff be-

came the purchaser. Defendant Speith, however, at the time of the sale, and during the whole course of the contention, insisted that said property was subject to his homestead claim, giving plaintiff full notice of his claim. This action, in the nature of ejectment, was brought by Ferguson, claiming title under said execution sale to obtain possession of said premises. Speith sets up his homestead claims in defense of the action. The land does not exceed in value or extent the statutory allowance for a homestead. The case was tried by the court below without a jury. The findings and judgment were in favor of the defendants. Plaintiff appeals.

H. C. Cockrill, and Charles S. Hartman, for Appellants.

I. The property in controversy was purchased with partnership funds. It remained partnership property up to the date of the death of Charles Krug; and such being the case the title of the property vested in Speith as surviving partner, for the purpose of the settlement of firm debts, and if Speith failed to settle the firm debts with the partnership property the same could be subjected to the payment of such debts by levy of attachment or execution. (*Krueger v. Speith*, 8 Mont. 482, and cases cited; Story on Partnership, §§ 344, 358, 361, 362; 2 Bates on Partnership, § 749, note 2, § 750, note 3; *Nelson v. Hill*, 5 How. 133; Drake on Attachments, § 571.)

II. The defendants could not have homestead in the property. It was purchased by the partnership for the partnership uses, with partnership assets, and being partnership property (*Roberts v. Eldred*, 73 Cal. 494; Story on Partnership, § 98, and notes 1 and 3) it was primarily liable for firm debts—was not subject to homestead. (Story's Equity Jurisprudence, § 694; *Greenwood v. Marvin*, 111 N. Y. 423; *Duryea v. Burt*, 28 Cal. 580; *Allen v. Wilkrow*, 110 U. S. 120; *Pepper v. Thomas*, 85 Ky. 539; Herman on Estoppel, p. 1056; *Bishop v. Hubbard* 23 Cal. 514; 83 Am. Dec. 132; *Gaylord v. Imhoff*, 26 Ohio St. 317; 20 Am. Rep. 761; Thompson on Homestead, § 194; *Kingsley v. Kingsley*, 39 Cal. 666.)

E. P. Cadwell, for Respondent.

The property claimed was a homestead, claimed and proven to be used and occupied as such by said Jacob F. Speith and

wife, Barbara Speith, ever since 1873, and hence not subject to sale under execution for the debts of the partnership. (*Lindley v. Davis*, 7 Mont. 206; *King v. Goetz*, 70 Cal. 236.) The only estate secured by the plaintiff under his execution sales against Jacob F. Speith was such title as Jacob F. Speith possessed at the time of the levy of the execution, merely an equitable title. The title to real estate owned by the members of a partnership, on the death of one member, vests in his heirs, charged only with the equity or a lien for partnership debts and the settling of the rights and claims of the partners of such partnership against each other; hence no legal title to the property, or any part thereof, is or was vested in the plaintiff by virtue of his sheriff's deed. (Lindley on Partnership, §§ 652-64; *Smith v. Jackson*, 2 Edw., c. 28; *McCauley v. Fulton*, 44 Cal. 355; *Wood v. Fleet*, 36 N. Y. 499; *Delmonico v. Guillaume*, 2 Sand. Ch. 366; *Buchan v. Sumner*, 2 Barb. Ch. 207; *Matter of Howe*, 1 Paige, 125; 19 Am. Dec. 395; *Dillon v. Brown*, 11 Gray, 179; 71 Am. Dec. 700; *Merritt v. Dickey*, 38 Mich. 41; *Thayer v. Lane*, Walk. Ch. 200; *Hanson v. Metcalf*, 46 Minn. 25; *Cummings' Appeal*, 25 Pa. St. 268; 64 Am. Dec. 695; *Greene v. Graham*, 5 Ohio, 264; *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510; *Ludlow v. Cooper*, 4 Ohio St. 1; *Patton v. Patton*, Winst. Eq. 20; 86 Am. Dec. 448; *Shanks v. Klein*, 104 U. S. 18-24; *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362; *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 210.)

PEMBERTON, C. J.—The question for this court to determine is this: Is a partner entitled to claim and hold a homestead exemption out of the partnership estate? Section 322, first division Code of Civil Procedure, reads as follows:

"SEC. 322. A homestead consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling-house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any town plot, city, or village; or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling-house thereon, and its appurte-

nances, owned and occupied by any resident of this territory (state) shall not be subject to forced sale on execution, or any other final process from a court: *Provided*, Such homestead shall not exceed in value the sum of two thousand five hundred dollars."

It will be observed that this statute does not except partners from the benefits thereof. In *Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578 (a case involving the right of partners to claim the statutory exemptions), Mr. Justice Porter, speaking for the court says: "The argument submitted for the appellant is ingenious; but its fallacy is apparent, in view of the conclusions to which it tends. If it proves any thing it is that the property of a firm is not owned by the persons who compose it, either collectively or otherwise. It certainly does not belong to any one else, and if the appellant is right, the title is in a state of abeyance. If the partners have such an ownership as subjects the property to seizure on execution they have also such an ownership as entitles them to claim its exemption, in a case plainly falling within the terms and intent of the statute.

"In the instance before us, the complaint alleges, and the answer admits, that the horses and harness in question were the property of the plaintiffs. The facts found by the referee meet all the requirements of the act, exempting from levy and sale the necessary team of 'any person, being a householder, or having a family for which he provides.' (4 Edm. Stats. 626.) It is insisted that the clause applies only to a several owner, as the word 'person' is used in the singular number. The short answer is, that by a provision in our general law, when a statute refers to any matter or person, by words importing the singular number, several matters or persons shall be deemed to be included, unless such a construction would be repugnant to the general language employed. (2 Rev. Stats., 778, sec. 11.)

"In respect to articles otherwise within the terms of the act, such ownership as suffices to make them subject to seizure brings them within the exemption. If each of the respondents had owned a pair of horses, both teams would have been exempt upon the state of facts found by the referee. It would be an obvious perversion of the statute to hold that the plain-

tiffs forfeited its protection by owning but a single team between them, used for the common support of both.

"The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them; the interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which its loss might reduce a family dependent on him for support. The judgment should be affirmed." (See note to this case in 93 Am. Dec. 579.)

In *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474, involving the rights of partners to homestead exemptions, the court say: "The questions made by the record are, first, whether, if a portion of the personal property included in the schedule of applicant belonged to the firm of Paschal and Heidingsfelder at the time the same was levied upon, and no severance had been made by the partners at that time, he was entitled to an exemption in such portion?

This exact question has never been ruled by this court. In *Harris v. Fisscher*, 57 Ga. 229, it was held, where each partner had applied for a homestead in partnership land, the same being assigned to them severally in separate parcels, a prior creditor, on reducing the debt to judgment, could not enforce the judgment over the homestead right.

In *Newton v. Summey*, 59 Ga. 397, an injunction was refused to a partner who sought to enjoin the wife of another member of the firm from taking homestead in the partnership land, on the ground that the property was partnership property, and needed to pay partnership liabilities.

Again, it was ruled in *Hunnicutt v. Summey*, 63 Ga. 586, that a homestead in the undivided half of the real estate belonging to a firm may be set apart to the wife of one of the partners, and such homestead will be valid against general creditors of the firm.

In the first case cited there had been a partition of the lands by the partners, between themselves, before the judgment. In

the second case, where the injunction was refused, the homestead had been set apart out of the undivided half of the premises. In the third case it was also set apart out of the undivided half of the real estate belonging to the partnership.

In the case before us it was after the levy that the settlement or severance was had by the partners, and it is claimed that it was then too late for any act of the partners to affect the rights of creditors, or to authorize the exemption, even if the right existed before the judgment, until after the partnership debts had been paid.

The theory of the plaintiff in error is that the partnership property must go to the payment of the partnership debts before any individual interest can exist, whereas, in fact and in law, the individual members of the firm are the real owners of the partnership property. And although the law directs how debts shall be paid, it never loses sight of the fact that a partnership is made up of individuals who own the assets. It is nevertheless true that in the absence of any legal provision giving a different direction to the disposition of the assets of a firm, they would have to be paid out as claimed. But here is interposed between this disposition of the property which an individual may have in a partnership another overriding and superior right thereto, which no court or ministerial officer can disregard, and no officer has the jurisdiction or authority to seize or sell, except for certain specified debts in which partnership debts are not included.

Unless, therefore, partnership property is to be appropriated to partnership debts, regardless of all individual rights, then whether the same was levied upon or not is wholly immaterial, as the judgment and levy can give the creditors no higher right as against an exemption and homestead than they had before.

Any other construction of the constitutional provision and the laws passed in pursuance thereof would be to put partnership debts upon a higher footing than individual debts, and on the same level with those excepted in the constitution, as well as to deny the right of homestead and exemption to possibly one-fifth of the heads of families in the state, and who happen to be engaged in partnership pursuits. And the constitution,

in effect, would then be made to read that each head of a family in this state shall be entitled to an exemption of personality and a homestead of reality, except partners, and they shall be excluded until they pay off and discharge all their partnership liabilities."

In *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232, Mr. Chief Justice Marston, delivering the opinion of the court, says: "The exemption laws of this state have ever received a most liberal construction in aid of the wise and humane policy so clearly set forth in our constitution and laws. As was said in *Rosenthal v. Scott*, 41 Mich. 633, the laws securing exemptions are not to be frittered away by construction so as to destroy their value. It has been held, accordingly, that one whose principal business was that of blacksmith might manufacture a wagon during his leisure time and offer the same for sale, and that it would be exempt while in process of manufacture and while held for sale. (*Stewart v. Welton*, 32 Mich. 56.) So the execution debtor is entitled to the full statutory exemption. Personal property subject to a mortgage for more than its appraised value cannot be turned out to him. (*Buyne v. Patterson*, 40 Mich. 658.) A homestead can be claimed in lands held in joint tenancy, or as tenants in common (*Lozo v. Sutherland*, 38 Mich. 171), and in lands of which a party was in possession under a contract to purchase. (*Orr v. Shraft*, 22 Mich. 261.) So a house, exempt as such, might be removed to another parcel of land without danger of seizure while in transit. (*Bunker v. Paquette*, 37 Mich. 79.) And a boarding-house keeper is entitled to the same exemption of household furniture as any other person. (*Vanderhorst v. Bacon*, 38 Mich. 669; 31 Am. Rep. 328.)

That the several members of a copartnership come within the language of the statute and constitution there should be no question, and that they, by becoming members of a firm, do not place themselves beyond the pale of the reason of the law would seem clear. The same reason which exists for protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of a firm. The whole object of the law is to prevent a person from being stripped of all means of carrying on his business, and in this

respect no distinction can exist between those who are members of a firm and those who are not.

Indeed, it is not claimed that members of a firm are not equally within the words and protecting care of the constitution and statute, but that the right is not given them, because of the peculiar rights of copartners to the firm property, as between themselves and also their creditors.

If the property is exempt under the statute, parties dealing with them must take notice of that fact, and it is no hardship whatever to enforce the right when the occasion arises which demands it. The creditor, in selling goods to the individual, knows that a certain portion of his debtor's property is not, and will not be, subject to his demands. And so if he sells to a firm, and the firm, or each member thereof, is entitled to a statutory exemption, the creditor sells in view of the hazard. There may be cases where, as between the members (and the same perhaps would not apply as to creditors), where one or more of the firm had no interest in the goods, but only in the profits, and some question might arise as to the right of such copartners to claim any part of the property as exempt; but such is not this case, and we do not, therefore, pass upon that question. So other difficulties may arise. Very many of these supposed difficulties are imaginary only, but we need not anticipate them. In my opinion the execution debtors in this case were each entitled, under our constitution and statute, to his exemption. (*Russel v. Lennon*, 39 Wis. 570; 20 Am. Rep. 60; and see the reasoning, also, in *Stewart v. Brown*, 37 N. Y. 350; 93 Am. Dec. 578.)

And it may be observed that the supreme court of Michigan, at the time of the rendition of this opinion, was composed of such able jurists as Chief Justice Marston, Benjamin F. Graves, Thomas M. Cooley, and James V. Campbell.

In *Swearingen & Garrett v. Bassett*, 65 Tex. 267, a case involving the right of a partner to a homestead out of the firm estate, the court say: "The decisions and the statutes referred to illustrate the tendency of our laws. Right or wrong, wise or unwise, from the beginning, neither the people in convention, nor the legislature, nor the courts have taken any backward steps. Every change has extended the protection, and

these have been sufficiently frequent to make the progress of expansion a steady march. When the courts have hesitated or halted they have been brought forward into line by the law-making power.

In the absence of the definitive legislation to guide us, and in obedience to the progressive tendency adverted to, we hold, against the preponderance of authority, but with the preponderance of reason, that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale."

See, also, *Evans v. Bryan*, 95 N. C. 174, 59 Am. Rep. 233, in which case the court hold that a partner is entitled to have his exemption set apart to him out of the partnership estate.

In Iowa the courts hold that a tenant in common may have a homestead set apart to him out of the common property (see *Hewitt v. Rankin*, 41 Iowa, 35; *Thorn v. Thorn*, 14 Iowa, 49; 81 Am. Dec. 451), and a number of the cases cited above hold that partners in real estate are in fact tenants in common.

In Minnesota, from which state our statutes of exemptions seem to have been taken, it is settled that a tenant in common is entitled to a homestead out of the common estate. This court has held that a tenant in common is entitled to a homestead out of the common property. (See *Lindley v. Davis*, 7 Mont. 206.) We are aware that a great many authorities hold that a partner or tenant in common is not entitled to a homestead out of the partnership or common estate. Perhaps, in the language of the Texas case, *supra*, the "preponderance of authority" is that way, but we think in the language of the same authority "the preponderance of reason" is with the authorities quoted above, to the effect that partners and tenants in common are entitled to a homestead out of the partnership or common estate. Our statute does not except partners or tenants in common from the benefit of its provisions. In *Lindley v. Davis*, 7 Mont. 206, our court says, "There is no pretense that the word 'owner' cannot be applied to a tenant in common." If the word "owner" as used in our statute includes tenant in common, by what kind of reason or logic can it be held to exclude partner? If so held it would be in effect to construe our statute to mean and read, in the language of

the Georgia case, *supra*, "that each head of a family in this state shall be entitled to an exemption of personality, and a homestead of realty, except partners, and they shall be excluded until they pay off and discharge all their partnership liabilities." This construction we consider too narrow and illiberal, and not authorized by the language of our statute.

Our constitution, article xix, sec. 4, is as follows: "The legislative assembly shall enact liberal homestead and exemption laws." The trend of the later and best considered adjudications is towards a liberal construction in favor of the debtor in such cases. In *Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578, the learned court say, "the language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them; the interest it assumes to protect is that belonging to the debtor, be it more or less."

The tendency of legislation is in the same direction of liberality. Our own court has uniformly given a liberal construction to our exemption and homestead laws. The common law stripped the debtor of all his property, if necessary to pay his debts, and put him in jail if he had not enough to pay in full. But we have traveled a long way from the inhumanity and cruelty of this system, and still the tendency is to a higher plane of liberality and humanity. The illiberal construction of our statute contended for by the appellant in this case, and heretofore and now in vogue in many jurisdictions, is too narrow and harsh; is not in keeping with the spirit of humanity that pervades the later best considered cases on the subject. It is retrogressive, and, if adopted, would relegate a large portion of our population to the rigors and cruelties of the common law.

We, therefore, hold that a partner, having the necessary qualifications, is entitled as against creditors of the firm to claim and hold a homestead in the partnership estate.

But this is not to be understood as affecting in any way the mutual rights and relations of partners among themselves in adjusting their rights and interests in the partnership estate.

The judgment of the court below is affirmed.

Affirmed.

DE WITT, J. (*concurring*).—I concur in affirming the judgment. The case of *Lindley v. Davis*, 6 Mont. 453, 7 Mont. 206, was earnestly contested by counsel, and deliberately considered by the court.

It was finally held that a cotenant was entitled to homestead in real estate held in cotenancy (7 Mont. 206). That decision remaining undisturbed, decides, I think, the case before us. In that case the court held that the facts showed that the premises had, by the partners, been withdrawn from the partnership assets, and were owned by the partners as cotenants, as in any other cotenancy (regardless of the partnership relations of the owners), and that they had been devoted to the homestead of the partner Davis, the defendant in the case.

I think, in the case at bar, that there is a stronger showing of a withdrawal of the premises, by the partners, from the partnership assets (if they ever were such), and a devotion of the same to the homestead of Speith. Such facts, and the application of the decision in *Lindley v. Davis*, that the cotenant is entitled to homestead in the common property, are sufficient, in my mind, to sustain the homestead claim of Speith. I, therefore, concur in the judgment pronounced.

BRUNELL, RESPONDENT, v. COOK, APPELLANT.

[Submitted October 11, 1893. Decided December 11, 1893.]

18	497
19	234
13	497
14	520

CLAIM AND DELIVERY—Measure of damages—Instructions.—In an action to recover possession of horses, wagon, and harness, with damages for wrongful detention, where no special damage is alleged, it is prejudicial error to instruct the jury that the measure of damages is “the reasonable value of the use or hire of the property while in the possession of the defendant from the time of the demand,” without also directing the attention of the jury to the consideration of whether the plaintiff could have kept such property constantly employed at a given rate, either by hiring to others, or by employment at home, or whether the gross earnings would have been diminished by expenses of keeping.

Appeal from Fourth Judicial District, Missoula County.

Claim and delivery. The cause was tried before MARSHALL, J. Plaintiff had judgment below. Reversed as to damages.

Henry C. Stiff, for Appellant.

George B. Wilds, for Respondent.

HARWOOD, J.—The instruction signifying to the jury the rule for the measurement of damages is the only assignment of error which we deem well founded. By this action plaintiff claims delivery of the possession of certain personal property, and damages for wrongful detention. In the usual form he alleges ownership of said property, viz: three head of work-horses, of the value of \$160 (two being of the alleged value of \$50 each, and the third \$60); also one "two-horse wagon" of the value of \$30, and a set of double-wagon harness, valued at \$20. The damage for wrongful detention of this property is alleged to be five dollars per day as the "reasonable hire for the use" thereot during the time of wrongful detention, which was from May 31 to October 11, 1892.

At the trial plaintiff prevailed, recovering judgment for possession of said property, or the value, as alleged, if return could not be made, together with damages in the sum of \$265 for wrongful detention. Thus the damage assessed for detention—about four months—is considerably more than the whole value of the property, and it does not appear that the property at all deteriorated in value. There is no special damage alleged, but simply the rate "for hire or use" thereof is alleged. If the property had been entirely converted, for instance, shipped out of the jurisdiction, sold, and the proceeds taken by defendant, so that return could not be enforced; or even if it had been absolutely destroyed in his possession, defendant's case would have been better, for in that event the measure of damage would be the value, \$210, and interest thereon at the lawful rate of 10 per cent for a little more than four months, for the conversion. (See Sedgwick and Sutherland on Damages, under topic of "Conversion.")

In the absence of extraordinary conditions, it would seem to be contrary to practical results that the net value for use or the earnings of this character of property for such a period of time should more than exceed the value of the animals, wagon, and harness used; and no extraordinary circumstances appear in the adjudication to enhance the damages above ordinary results.

The rule for measurement of damages given to the jury in the instruction by the court is as follows: "The court instructs the jury that if they find for the plaintiff they should find the value of the property, and also find for the plaintiff the damages they believe he has sustained by reason of the detention thereof; that the damages, if they find for the plaintiff, are the reasonable value of the use or hire of the property while in the possession of defendant from the time the demand for the property was made on him, to wit, the thirty-first day of May, 1892, up to the present time." Under ordinary circumstances it would seem to be contrary to practical experience for farmers (as in this case) to keep such property constantly employed at a given rate of earnings, either by letting to others for hire or by employment at home; or to set down the gross earnings as profits, undiminished by any expense for feeding, care, and otherwise. And where the "value for hire or use" is adopted as the criterion for computation of damage for wrongful detention of personal property, the attention of the jury should be called to those points of consideration, and not directed to the computation of gross earnings for an unbroken period of time, unaccompanied by those other considerations. These elements of the problem were not given in consideration to the jury along with the other suggestions given, and without such accompaniment we think the instruction is defective, and prejudicial to defendant in its tendency. The actual damage is all that should be assessed, as there is no circumstance of aggravation shown. The property appears to have been originally taken from plaintiff by a constable, and sold under an alleged legal process; but in these proceedings such alleged process was held to be entirely void.

That part of the judgment which provides for recovery of damage must be reversed, and the case remanded for new trial on the question of damages, unless the parties by agreement fix the amount for which judgment as damages may be entered. In other respects the judgment is affirmed. Costs of this appeal apportioned equally between the parties.

Reversed in part.

PEMBERTON, C. J., and DE WITT, J., concur.

WASTL, RESPONDENT, v. MONTANA UNION RAILWAY COMPANY, APPELLANT.

[Argued , 1893. Decided Dec. 4, 1893.]

NEW TRIAL—Notice of intention—Withdrawal of motion.—Upon a motion for a new trial the notice of intention to move is the foundation of the proceeding, and a formal written motion is not essential; therefore, where a written motion has been made, its withdrawal and the substitution of another after the time for filing a notice had expired does not constitute, in effect, a withdrawal of the notice of intention to move so as to operate as an abandonment of the proceeding. (*Wallace v. Lewis*, 9 Mont. 899; *Fabian v. Collins*, 2 Mont. 510, cited.)

SAME—Consent to order—Construction of stipulation.—The submission of a motion for a new trial by consent, without argument, accompanied by a statement by the moving party that the court might pass upon said motion then and there without taking time to consider the same, and that so far as defendant was concerned the motion might then and there be overruled, is not such a consent to the order overruling the motion as would justify this court in refusing to review the order as one entered by consent of the party affected thereby, where it appeared that the remarks were made in view of the fact that the questions involved had theretofore been argued and considered, and appellant understood his time for appealing was about to expire.

Appeal from Second Judicial District, Silver Bow County.

On motion to dismiss the appeal. Denied.

George Haldorn, for the Motion.

J. S. Shropshire, contra.

HARWOOD, J.—Respondent, by motion, urges the dismissal of this appeal on alleged grounds as follows: 1. Because appellant, by leave of court, withdrew his motion for a new trial, and thereafter filed another motion in its stead, “long after the time for filing notice of intention to move for a new trial had expired, as appears from the transcript on appeal”; 2. Because “appellant consented that the court might pass on the motion for a new trial without taking time to consider the same, and that, so far as appellant was concerned, the motion might be then and there overruled by the court.”

It appears that the trial of this action resulted in judgment for plaintiff, and thereupon defendant, within the time provided by law, served upon respondent its notice of intention to move for a new trial upon certain grounds set forth, and thereafter, within the time required, prepared, served, and ob-

tained the settlement of its statement on motion for a new trial, and filed the same with the clerk of the court. It appears by entry of record that when the motion for new trial was brought on for hearing, three days after the settlement and allowance of the statement, defendant was "granted leave to withdraw motion for a new trial hereinbefore filed, and defendant files a motion for a new trial herein, which motion is by consent submitted to the court without argument, and said motion is by the court overruled." This record entry implies that defendant had filed a motion for new trial in said case, and on withdrawing it, by leave of court, immediately substituted another motion for a new trial, which was then and there brought on for hearing, and ruled upon by the court.

Respondent's counsel, in urging the dismissal of this appeal, insists that, by the withdrawal of the motion for a new trial by leave of court, appellant withdrew his notice of intention to move; that the notice of intention really constitutes the motion for a new trial, and a formal written motion is not essential; that, therefore, if the notice of intention to move constituted the motion, the withdrawal of the motion was in effect, technically, a withdrawal of the notice of intention to move. We do not find such intendment in the fact that in addition to his notice of intention to move for a new trial, setting forth the grounds thereof, accompanied by the statement of the case "specifying particulars" relied on, appellant prepared, in writing, a formal motion, and, apparently not being satisfied with the motion first prepared, withdrew it, by leave of court, and substituted another formal motion for a new trial in its stead. We see nothing improper in this practice, nor any ground or implication whereby we could justly interpret the withdrawal of the first motion as a withdrawal of the intention to move, which is the very foundation of the whole proceeding. It is true, as respondent's counsel concede, that, strictly, a formal written motion for a new trial is not essential to the proceeding; that is, the proceeding is not defective if the hearing is brought on by application of counsel to the court for a new trial, based upon the notice of intention to move, and the record, statement, bill of exceptions, or affidavit (section 298, Code Civ. Proc.), used in support of the motion (*Wallace v. Lewis*, 9 Mont. 399;

Fabian v. Collins, 2 Mont. 510). That being the case, we are unable to perceive upon what rules of logic or reason it should be held that the presentation of a formal motion in writing, and the withdrawal thereof, and substitution of another, was, in effect, the withdrawal of the notice of intention to move for a new trial; in other words, practically an abandonment of the proceeding. Such an interpretation would, in effect, make a matter of surplusage overthrow the whole proceeding. Besides this, appellant's counsel explains how the first motion for a new trial was left with the clerk of court along with the statement, and was filed without his knowledge, intention, or consent, and thus became one of the files prematurely, and was therefore withdrawn. We find in these events no ground for dismissing the appeal from the order overruling appellant's motion for new trial.

The second alleged ground upon which respondent relies to dismiss the appeal is that appellant consented to the order overruling his motion for a new trial, citing several cases wherein courts of last resort have declined to review an order or proceeding entered by consent of the party affected thereby. We readily concur in the proposition that a party would not be entitled on appeal to a review of an order or proceeding to which he consented; that is, where it appears that the complaining party assented to the substance and effect of the decision, he would not be entitled to a review thereof on appeal. We must therefore first ascertain whether the conduct of appellant has been such as to fairly justify the conclusion that he so consented to the disposition of his motion for a new trial. The record entry quoted above recites that the motion was, "by consent, submitted to the court without argument"; but this entry is supplemented by stipulation in which counsel for appellant admits that, when said motion was submitted and ruled upon, appellant said that the "court might pass upon said motion then and there, without taking time to consider the same, and that, so far as defendant was concerned, the motion might then and there be overruled." The record further shows that, immediately after the overruling of appellant's motion for a new trial, its appeal was perfected from the order.

On the argument of this motion, appellant's counsel frankly admits that, on submission of the motion for a new trial, he made suggestions to the effect set forth in said stipulation. But he explains that those observations emanated from no captious spirit, as might possibly be inferred from reading them separate from other conditions and events apparent to the court below, nor from an intention to abandon the motion for new trial, or to consent to the rulings which appellant was seeking to have reviewed through that proceeding, but that the suggestions quoted emanated from the urgency of the situation which confronted appellant's counsel, as he understood his limitation of time for appealing was near at hand; that his remarks were so understood by the court at the time, in evidence of which he points to the order of the court, which merely recites that he "consented to the submission of the motion without argument"; that the remarks were made in view of the fact that all the questions and conditions involved were familiar to the trial court, and had been theretofore argued and considered.

Upon careful consideration, we are unable to find in the showing on this point such tendency as would warrant the interpretation urged by respondent, or the dismissal of the appeal. It is one thing to consent to the conditions on which a controversy is to be determined, adjusted, or settled, and another to ask a court to make a formal ruling upon a proceeding which had been fully considered in that court, so as to enable the party feeling aggrieved to appeal for a review of the questions involved. We think appellant's conduct and suggestions at the time of submitting the motion for new trial signify the latter intention only.

Order denied.

PEMBERTON, C. J., and DE WITT, J., concur.

WELLS, APPELLANT, v. DARBY, RESPONDENT.

[Argued March 28, 1893. Decided December 20, 1893.]

FORCIBLE ENTRY AND DETAINER—*Acta constituting.*—Entering upon premises and procuring the possession thereof from the agent and servant of the party in possession by threats of arrest if he does not surrender them within two hours is a forcible entry and detainer within section 716 of the Code of Civil Procedure defining such offense to be constituted, *inter alia*, by a peaceable entry and the turning out by force, or frightening by threats, or other circumstances of terror, the parties out of possession, and detaining and holding the same. (*Sheehy v. Flaherty*, 8 Mont. 365; *Febes v. Tierman*, 1 Mont. 179, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

Forcible entry and detainer. Judgment was rendered for the defendant below by BUCK, J., on motion for nonsuit. Reversed.

T. E. Crutcher, for Appellant.

A forcible entry and detainer is a violent taking and keeping possession by one, of any lands and tenements occupied by another, by means of threats, force, or arms and without authority of law. (8 Am. & Eng. Ency of Law, 101.) The law implies that an unauthorized entry upon the premises of another is made with force, and no evidence of such force is required. (*Febes v. Tierman*, 1 Mont. 179; *Burt v. State*, 3 Brev. 413.) An entry into the possession of another against his will, however quietly it may be done, is a forcible entry in legal contemplation. (*Croff v. Ballinger*, 18 Ill. 201; 65 Am. Dec. 735.) If the plaintiff is in peaceable possession and the defendant forcibly enters upon him, he can maintain forcible entry and detainer though the title may be in the defendant. (*McCauley v. Weller*, 12 Cal. 500.) To constitute a forcible entry and detainer it is not necessary that violence and outrage upon person or property should be resorted to. If the actual possession be taken and held under circumstances which show that it will not be surrendered without a breach of the peace, it is a forcible entry and detainer. (*Childress v. Black*, 9 Yerg. 317; *Sheehy v. Flaherty*, 8 Mont. 356; *Smith v. Hoag*, 45 Ill. 250; *Jarvis v. Hamilton*, 16 Wis. 574.) The obvious aim of the statute is to prevent any man from asserting his title or right by violence. Its purpose is to defeat the occupa-

tion and possession of property by force, and to cause every man to submit to the law instead of being a law unto himself. (*Boardman v. Thompson*, 3 Mont. 390.) An action of forcible entry and detainer is *quasi* criminal in its nature, and is designed to prevent breaches of the peace. It does not admit of a defense of title or right of possession. The defense must be confined to actual possession. (*Parks v. Barkley*, 1 Mont. 517; *Boardman v. Thompson*, 3 Mont. 389; *Sheehy v. Flaherty*, 8 Mont. 369.) If the entry was either forcible or unlawful then the detention related back to the entry and became forcible. (*State v. Wilson*, 94 N. C. 839; *Dickinson v. Maguire*, 9 Cal. 46; *Davis v. Woodward*, 19 Minn. 174.)

Ashburn K. Barbour, for Respondent.

It was not shown that the possession was taken by peaceable entry and turning out by force or threatening by threats or other circumstances of terror the party or parties out of possession, and therefore a recovery could not be maintained upon that ground. Nor was the entry made in the temporary absence of the party or parties in possession; as the plaintiff was there present by his agent at the time the possession was taken. Even if the presence of the servant was not his peaceable possession, then it cannot be maintained. (*Hammel v. Zobelein*, 51 Cal. 532; *Barlow v. Burns*, 40 Cal. 351.) There is no evidence of any force being used in detaining the possession of this property, or of any demand being made for its possession by the appellant. Even had there been a forcible detainer, plaintiff could not recover. (*Potter v. Mercer*, 53 Cal. 674.) One who enters peaceably and in good faith under a claim of title, is not liable for an unlawful detainer, even if he resists the entry of the prior possessor. (*Conroy v. Duane*, 45 Cal. 598.) The declaration of defendant to plaintiff that he will not go off the premises unless put off by force or by law, does not constitute a forcible detainer. The mere surmise of the party that if he attempts to regain possession, force will be used to prevent it, is not enough to show a forcible detainer; but an attempt must be made to regain possession, and either force or threat of force used to resist it. (*Hodgkins v. Jordan*, 29 Cal. 577.) "The statute does not include every entry upon

lands, or every trespass." (*Sheehy v. Flaherty*, 8 Mont. 369.) No force was shown or exhibited in obtaining possession of the premises in question. The respondent declared his intention simply to resort to legal process to put appellant's agent out of possession. There was no breach, or threat of breach, of the peace, or threatened bodily harm or injury, or any exhibition of arms or other circumstances of terror. Therefore appellant failed to prove his case. (*Preston v. Kehoe*, 15 Cal. 315; *Thompson v. Smith*, 28 Cal. 527; *McMinn v. Bliss*, 31 Cal. 122; *Peacock v. Leonard*, 8 Nev. 84; *Jarvis v. Hamilton*, 16 Wis. 574; *Parks v. Barkley*, 1 Mont. 517.) In all cases there must be something more than a mere trespass upon the property. (*Castro v. Tewksbury*, 69 Cal. 568; *Wilbur v. Cherry*, 39 Cal. 680.)

PEMBERTON, C. J.—This is an action of forcible entry and detainer.

In the trial of the cause in the court below, at the close of the testimony on the part of plaintiff, the defendant moved for a nonsuit on the ground "that the said plaintiff has failed to prove a sufficient cause to entitle him to a judgment herein, inasmuch as he has failed to prove a forcible or unlawful entry of the premises in question."

The court sustained the motion, and entered judgment in favor of defendant for costs. From this action of the court this appeal is prosecuted.

The evidence in the case is substantially as follows:

Plaintiff had been in possession of the premises (the title to which seems to be in dispute) since 1878, having built houses, fences, stables, etc., thereon, and occupied the same until the twenty-seventh day of April, 1892, when he found the defendant in possession of the same; that he found his furniture moved out and stored in an outhouse, and that the defendant and his family forbade him to further occupy or use the premises; that William Crosswright was plaintiff's hired man in possession of the premises on the twenty-seventh day of April, 1892. William Crosswright, as the agent and hired man of plaintiff, was in possession of the premises on the twenty-seventh day of April, 1892, when the defendant came and,

after showing some papers, demanded possession of the premises of Crosswright. Crosswright declined to surrender the possession thereof until he could see the plaintiff. The defendant then said to witness that he would have him arrested in two hours if he did not give up possession. Witness says he would not have given up the possession but for the threat to have him arrested until he had seen and informed plaintiff. Witness says he gave up the premises on account of said threat; that he did not want to get mixed up in the matter; that it was not his fight; that under these circumstances he left the premises, surrendering the possession thereof to defendant.

Our statute, section 716, first division, Code of Civil Procedure, defining forcible entry and detainer, is as follows:

"SEC. 716. No person or persons shall hereinafter make any entry into lands, tenements, or other possessions, or by entering upon any gulch, mining claim, or quartz lode mining claim, or other mining claim, in the temporary absence of the party or parties in possession, or by entering peaceably and the turning out by force, or frightening by threats, or other circumstances of terror, the party or parties out of possession, and detain and hold the same. In every such case the person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act."

Did the acts and language of defendant tend to prove a forcible entry and detainer under this statute? Were the language and acts of defendant toward Crosswright calculated to frighten him or place him in terror? If so, was it by the use of such means that the defendant obtained the possession of the premises? If so, the defendant was guilty of such acts as are denounced by the statute as constituting a forcible entry and detainer.

In *Sheehy v. Flaherty*, 8 Mont. 365, the court says: "We are not to be understood as declaring that there must be actual physical force, or an actual or threatened breach of the peace, in order to make an entry made in the presence of one in possession a forcible entry."

We think the evidence tends to prove that the defendant entered upon the premises and took possession "without the consent and against the will of the party in possession." The

witness, Crosswright, swears that he would not have given up the possession but for the threat of defendant to have him arrested in two hours.

We think the evidence tends to show that defendant's entry upon the premises in question was unauthorized. In *Febes v. Tiernan*, 1 Mont. 179, the court, speaking through Mr. Justice Knowles, say: "The unauthorized entry upon the premises of another is a trespass. When such a state of facts is established, the law implies that the entry was done with force, and it is not necessary to offer any further evidence upon that point."

We think the evidence tends to show that the defendant's entry upon the premises in question was unauthorized; that he turned out of possession the party in possession by threats, and placing him in terror of arrest, and thereby obtained possession.

If the evidence tended to prove these facts, it tended to establish the allegations of the complaint. In determining the motion for nonsuit, the court should have deemed proved whatever material allegations the evidence *tended to prove*. We think the court erred in sustaining the motion for nonsuit.

The judgment is therefore reversed.

Reversed.

HARWOOD and DE WITT, JJ., concur.

MATTINGLY ET AL., RESPONDENTS, v. LEWISOHN,
APPELLANT.

[Argued April 4, 1893. Decided December 23, 1893.]

18 508
24 251
24 291

MINES AND MINING—Judgments—Reversal.—In an action instituted under section 2326 Revised Statutes of the United States, to determine the right of possession to a quartz mining claim wherein it was determined that neither party had established a title, a reversal of the judgment on defendant's appeal, upon the ground that a demurrer to the complaint should have been sustained, vacates it entirely, together with all proceedings subsequent to the demurrer, and therefore an amended complaint filed after such reversal will not be stricken out upon the theory that the judgment still stood in force as an adjudication of plaintiff's rights.

SAME—Declaratory statement—Instructions.—In an action to determine the right of possession to a mining claim, it is proper to instruct the jury that the declaratory statement required to be filed by the locator of a mining claim, and

recorded in the office of the recorder of the county in which the claim is located, must be on oath. (*Metcalf v. Prescott*, 10 Mont. 283, cited.)

SAME—Annual representation—Instructions.—In such case an instruction, in effect, that it was not necessary for the plaintiffs to prove annual representation of their claim, is proper, where there was no issue raised by the pleadings in respect thereto.

SAME—Same—Instructions.—In such case an instruction upon the issue of annual representation is not prejudicial to defendant which states that there is no dispute that seventy-five dollars worth of work was done on defendant's claim, but that as to the remaining twenty-five dollars the fact is disputed, and the evidence conflicting, where the actual amount in dispute was but a few dollars less.

SAME—Same—Instructions.—An instruction which correctly states the requirements of the law in respect to annual representation cannot be held erroneous in that it exacts too rigid a compliance with the letter of the mining laws.

SAME—Same—Instructions.—In such case an instruction upon the question of annual representation, that, in estimating the amount of work or improvements, the test is not what was paid for it, but depends entirely upon whether or not said work or improvements were reasonably worth the sum of one hundred dollars, is proper, and is not susceptible to the construction that the value of the claim must have been enhanced by such work.

Appeal from Second Judicial District, Silver Bow County.

Action to determine the right of possession to mining property. The cause was tried before McHatton, J. Plaintiffs had judgment below. Affirmed.

M. Kirkpatrick, for Appellant.

I. The court erred in overruling defendant's motion to strike out the amended complaint. The legal effect of the judgment of the supreme court was to reverse only that portion of the judgment appealed from which adjudged that defendant Lewisohn had established no title to the premises in controversy; leaving that portion of said judgment whereby it was adjudged, that plaintiffs had established no title to said premises, unreversed and final as to plaintiffs; and that plaintiffs were thereby precluded from asserting any right or title in, or to said premises; had no right to file the amended complaint or to introduce evidence in support of its allegations, or to participate in the trial of the action. The judgment of the district court rendered March 12, 1887, was in legal contemplation an adjudication that the plaintiffs had no right or title in or to the premises in controversy. (*Jackson v. Roby*, 109 U. S. 444.) That judgment remains unreversed and final as to the plaintiffs, notwithstanding the appeal prosecuted by defendant Lewisohn,

and the judgment rendered thereon by the supreme court of Montana territory. It is a judgment severable in law, and in fact, into two distinct elements; a judgment compounded of two adjudications, separate and distinct from each other in character, and in the consequences attached to each. By the one it was adjudged that the plaintiffs had no title to the premises in controversy; by the other that the defendant had no title to the premises in controversy. The judgment is in favor of neither of the parties to the action, but against both. Neither party has any interest in the adjudication rendered against the other, since a similar adjudication was rendered against himself. It cannot matter to Lewisohn that plaintiffs are adjudged to have no title as long as he also is declared to be in the same category. In short, these adjudications are as distinct and severable as though they had been rendered on different days or in different actions. There is no assignment that the court erred in rendering judgment against the plaintiffs, nor in any action or ruling which led to that result. Thus the notice of appeal read in connection with the specifications of error show that Lewisohn's appeal was limited to that distinct part of the judgment which was rendered against himself. The statute limits the right of appeal to parties who are aggrieved. (Code Civ. Proc., § 420.) Lewisohn was in no manner aggrieved by the judgment against the plaintiffs, and had no right to appeal therefrom. "An appeal," says the supreme court of the United States, "brings up for review only that which was decided adversely to the appellant." (*Loudon v. Taxing district*, 104 U. S. 771, 774; *Buckingham v. McLean*, 13 How. 150; *Chittenden v. Brewster*, 2 Wall. 191, 195.) And, as the cases show, the principle applies whether the appeal is from the whole or a part of a judgment or decree. It applies *a fortiori* to a case like the present, where the judgment is composed of two entirely distinct adjudications, and where the assignments of error show that the appellant sought the reversal of the one against himself only. In such a case it is a matter of jurisdiction, and the appellate court has no jurisdiction to reverse the adjudication, which was made in the trial court against the party not appealing, and who by not appealing admits its correctness and waives all errors. (See,

also, *Tilden v. Blair*, 21 Wall. 241; *United States v. Hickey*, 17 Wall. 9, 13; *City Nat. Bank v. Hunter*, 129 U. S. 578; *Mackall v. Mackall*, 135 U. S. 167.) A party who is aggrieved by one branch of a decree does not thereby acquire a right to call in question another portion of a decree which has no bearing or effect on his rights and interests. (*Cuyler v. Moreland*, 6 Paige, 273, 275; *Hayne on New Trial and Appeal*, § 281; *Hathaway v. Brady*, 23 Cal. 122, 125; *Morley v. Elkins*, 37 Cal. 454; *People v. Noregea*, 48 Cal. 123; *Dougherty v. Henarie*, 47 Cal. 9, 13; *McCreery v. Everding*, 44 Cal. 284; *Hibernia Bank v. Ordway*, 38 Cal. 679; *Farmers' L. & T. Co. v. Waterman*, 106 U. S. 265; *Randall v. Hunter*, 69 Cal. 80; *Jackson v. Brown*, 82 Cal. 275; *People v. Reis*, 76 Cal. 269; *People v. Leet*, 23 Cal. 163; *De Leon v. Higuera*, 15 Cal. 496; *Ricketson v. Richardson*, 26 Cal. 149, 155; *Steele v. White*, 2 Paige, 478; *McGregor v. Pearson*, 51 Wis. 122; *Gage v. Davis* (Ill. Nov. 11, 1887), '14 N. E. 36; *Bank of Oxford v. Robbitt*, 108 N. C. 525.) It does not alter the case that the supreme court placed its judgment of reversal on the ground that the complaint did not state facts sufficient, in that it failed to allege that the plaintiffs had filed an adverse claim and commenced suit within the time limited by statute. Such reversal did not effect the adjudication against the plaintiffs, but only that against the defendant who appealed. (*Lake v. Tibbitts*, 56 Cal. 481, 484; *Nichols v. Dunphy*, 58 Cal. 605.)

II. The jury were instructed that there was no dispute that seventy-five dollars' worth of work was done on the Miners' Union in 1884, but that as to the remaining twenty-five dollars the fact is disputed and the evidence conflicting. It is conceded that at least \$78.50 worth of work was done in 1884. The state of the evidence taken in connection with the instruction makes the smallest amount material. The instruction was erroneous. (*Hayne on New Trial and Appeal*, 343-45, 851-53.)

III. The instruction is likewise erroneous in exacting too rigid a compliance with the letter of the mining laws. Those laws have never been construed by the courts according to their letter; but in a spirit of liberality towards the prior locator and honest occupant of mining ground, and so as to avoid,

if possible, a forfeiture of prior rights. (*Quimby v. Boyd*, 8 Col. 208, 209; *Flavin v. Mattingly*, 8 Mont. 246; *Russell v. Chumasero*, 4 Mont. 309; *McGinnis v. Egbert*, 8 Col. 46; *North Noonday M. Co. v. Orient M. Co.*, 6 Saw. 300, 309, 313, 314; *Jupiter M. Co. v. Bodie M. Co.*, 7 Saw. 96, 114, 115; *Zatters v. Highland Chief*, 2 McCrary, 39-43; *Patchen v. Keeley*, 19 Nev. 404, 415; *Craig v. Thompson*, 10 Col. 528; *Southern Cross etc. Mining Co. v. Europa Mining Co.*, 15 Nev. 383; *Carter v. Bacigalupi*, 83 Cal. 192, 193; *Golden Fleece etc. Co. v. Cable etc. Co.*, 12 Nev. 326, 327.)

IV. The notice of location was admitted in evidence without exception by plaintiffs. They are now precluded from urging any objection thereto. (*Garfield etc. Co. v. Hammer*, 6 Mont. 62.) The notice of location is sufficient. There was a substantial compliance with the statute and the essential facts are stated "on oath." (*Hausworth v. Butcher*, 4 Mont. 299, 309; *Russell v. Chumasero*, 4 Mont. 317.)

F. T. McBride, for Respondents.

The judgment of the district court of March 12, 1887, was not in legal contemplation an adjudication that the plaintiffs had no right or title in or to the premises in controversy. Section 2326 of the Revised Statutes of the United States, as amended by the act of Congress of date March 3, 1881, under which section counsel correctly alleges the action was brought, does not authorize that kind of a judgment to be rendered. The action was one in which the United States was interested, but was not a party. There were two opposing parties in the action, parties plaintiff on the one hand and parties defendant on the other, and there was one judgment rendered, and when defendant appealed therefrom he appealed from the whole judgment so far as it concerned himself on the one hand and the opposing parties plaintiff on the other. The plaintiffs were parties in the supreme court, and that court had jurisdiction over the entire judgment so far as it concerned Mattingly et al. on the one side and Lewisohn on the other. (*Barkley v. Logan*, 2 Mont. 296; *Chittenden v. Brewster*, 2 Wall. 191; Comp. Stats., div. 1, § 441.) And when the supreme court reversed the judgment of the district court and remanded the cause on account

of error occurring before the trial, the case was returned to the district court for trial between the plaintiffs on the one hand and the defendant Lewisohn on the other upon all the issues, (*Hayne on New Trial and Appeal*, 904, 905, 906, and 907, and cases cited; *Collier v. Erwin*, 2 Mont. 556; *Woolman v. Garringer*, 2 Mont. 405-08.)

II. The court was justified in instructing the jury that there was a conflict of testimony as to the said remaining twenty-five dollars of representation work for the year 1884.

The instruction does not require more than the United States statute, the language of the statute being that not less than one hundred dollars of work, etc., shall be performed, etc.

Neither a rule of miners nor a state statute can authorize less than one hundred dollars annual labor or representation work without being in conflict with the laws of Congress, and, therefore, void. (*Sweet v. Webber et al.*, 7 Col. 443.)

III. The notice of location of the Miners' Union lode claim is fatally defective, inasmuch as it is not on oath. (*O'Donnell v. Glenn*, 8 Mont. 254; 9 Mont. 452; *Metcalf v. Prescott*, 10 Mont. 283.)

Statement of the case by Mr. Justice HARWOOD.

Among other assignments, appellant's counsel criticise as erroneous certain instructions numbered 1, 3, 4, 5, and 6, given by the court to the jury, as follows:

1. "A location of a quartz lode claim is made by complying with the requirements of the laws of the United States and of the territory or state of Montana, and such requirements are as follows, to wit: There must be discovered within the limits of the claim located a vein or crevice of quartz or other rock in place, bearing gold, silver, or other precious metals, and the vein or crevice must have at least one well-defined wall rock; the location must be so well and distinctly marked on the ground that its boundaries can be readily traced, and, within twenty days after making the location, the locator or locators must file and have recorded in the office of the county recorder of the county in which the claim is situated a declaratory statement on oath, containing the names of the locators, the date of the location, and such a description of the claim located, with

reference to such natural objects or permanent monuments, as will identify the claim; the claim located may equal but cannot exceed fifteen hundred feet in length along the vein, and three hundred feet in width on each side of the center of the vein; the locator or locators must be citizens of the United States, or must have declared their intention to become such."

3. "It is not alleged or pleaded on the part of the defendant that the plaintiffs have forfeited the ground in controversy in this action by reason of a failure to perform the labor or make the improvements required by law, and there is no necessity for plaintiffs to prove such representation, but if you find the ground in controversy herein was on the first day of January, 1885, vacant and unappropriated ground, and that the plaintiffs, or those under whom the plaintiffs claim, located the same according to the law as given you in the instruction herein, then you will inquire no further, but will find a verdict for the plaintiffs."

4. "The plaintiffs in this action deny the location of the Miners' Union lode claim, and also allege that the said claim, if it ever was located, has been forfeited by a failure, on the part of the defendants and their predecessors in interest, to perform the labor or make the improvements required by law during the year 1884; and if the jury find from the evidence either that there was no location of the Miners' Union lode claim, or that the same was forfeited for failure to perform the labor or make the improvements required by law, then in either case the ground would be subject to location, and if the plaintiffs complied with the requirements of the law as hereinbefore given in making their location, then the jury are instructed to find for the plaintiffs."

5. "If you find from the evidence that although Fisher may have made a valid location of the said Miners' Union claim, but he or his successors in interest failed to do one hundred dollars' worth of work, or to place one hundred dollars' worth of improvements on the said claim in the year of 1884, the ground was subject to relocation on the first day of January, 1885.

"It is claimed, and there is no dispute, that seventy-five dollars' worth of work was done on the said claim by Jacobs, and

the controversy between the respective parties is as to whether or not Carroll, or either of them, did the other twenty-five dollars' worth of work, upon which point there is a conflict of testimony, and you will be the exclusive judges of the weight to be given to the testimony of the respective witnesses and their credibility, as well as their means of knowledge, and that if you find that there was not twenty-five dollars' worth of work done by the said Carroll, or, in other words, if you find that that there was not one hundred dollars worth of work done by all the claimants of the said Miners' Union lode claim, you will find that the said claimants forfeited all right and title to the same, and the said ground was, on the first day of January, 1885, subject to relocation, and if there was any amount less than one hundred dollars' worth done, in the eye of the law, it occupies the same position, and their claim was forfeited as much so as if they had done none at all, for the law says that there shall be one hundred dollars' worth of work done, or improvements made on a claim for each year."

6. "In determining the amount of work done upon a claim, or improvements put thereon for the purpose of representation, the test is as to the reasonable value of the said work, or improvements, not what was paid for it or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars."

The other facts are stated in the opinion.

HARWOOD, J.—This action was instituted pursuant to the provisions of section 2326 of the Revised Statutes of the United States to determine the right of possession to a certain quartz lode mining claim, situate in Silver Bow county, Montana, as between appellant, who was applicant for a patent thereto under the name of "Miners' Union Lode Mining Claim," and the respondent, who was the adverse claimant, with others, of said ground, under a location known as the "Great Eastern Quartz Lode Mining Claim."

The case has been pending since 1886, and the present appeal is from the judgment rendered as the result of a second trial, wherein it was determined for the second time, that

appellant, Lewisohn, failed to establish title and right of possession to said ground; and also an appeal from an order overruling his motion for new trial.

The first and most important question presented on this appeal is as to the effect of the first trial, the judgment and reversal of that judgment by the supreme court on a former appeal.

The report of the consideration and determination of the case on the former appeal is found in 8 Mont. 259; and as there shown, the first trial resulted in findings to the effect that neither party had established a title to the ground in dispute; and judgment was pronounced accordingly.

Defendant prosecuted an appeal from the whole of said judgment, assigning certain errors alleged to have been committed by the court below in the trial by way of ruling out certain evidence offered by defendant, and also assigning and urging the proposition that the complaint as originally filed failed to state facts sufficient to constitute a cause of action; which last objection was also raised in the court below by demurrer to the complaint. The supreme court considered, as appears from the opinion cited *supra*, but one question on that appeal, namely, whether or not the complaint was sufficient, and held that it was not, and thereupon reversed the judgment, and remanded the case, with direction to the trial court to sustain the demurrer to the complaint.

Thereafter, on return of *remittitur*, plaintiff filed an amended complaint by leave of court, which complaint was afterwards further amended by leave of court, setting up substantially the facts pleaded in the original complaint, and also undertaking to make the complaint sufficient in the respects wherein it was found wanting on the former adjudication. Now, defendant, who had appealed and caused the former judgment to be reversed as aforesaid, moved the trial court to strike the amended complaint from the files of said court, on the ground that the facts set up by plaintiffs, whereby they claimed title and right of possession to said ground in dispute, had been adjudicated and determined against them, and that such determination had not been vacated on appeal. This position was taken by defendant on the theory that the former judgment against plain-

tiffs, declaring them without title to said mining ground, still stood in full force and effect, notwithstanding the appeal and reversal of said judgment. The trial court, however, overruled said motion to strike out plaintiffs' amended complaint, to which ruling exception was reserved by defendant, and that question is here presented on this appeal as the main question for determination.

Appellant contends that the reversal of the case on the former appeal was only a vacation of the judgment as to its effect in determining that defendant was without title or right of possession to the ground in dispute.

The conclusion reached by this court upon consideration of that question is that appellant cannot be sustained in his contention that the former judgment after reversal still stood in full force and effect against the plaintiffs. If the former appeal had been taken distinctly from part of the judgment (*Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461), and the same had been reversed as to the part only relating to defendant's rights and claim upon said ground, for error committed in respect to that determination, there would undoubtedly be great force in the position contended for by appellant, but the judgment was reversed because the complaint was found wanting in the attempt to state a sufficient cause of action; and a reversal of the judgment unconditionally on such a ground would seem to have entirely vacated it, together with all proceedings subsequent to the demurrer. The supreme court held on the appeal that the case had never been properly in court, and that the demurrer interposed to the original complaint ought to have been sustained; and for that cause the supreme court held that the judgment must be reversed, treating all proceedings subsequent to the demurrer as null and void. We think in such a determination as that it cannot be maintained that the judgment still stands in force as an adjudication and determination of the rights of plaintiffs in that action. To hold with appellant on this point would be to declare such a judgment as existing, valid, and binding in certain respects; while at the same time holding that part of the judgment-roll which is necessary to sustain the judgment was wanting, and also holding that for that reason the judgment

should be reversed and set aside, root and branch. Such a position, we think, is untenable. If, on the former appeal, appellant had so shaped his course as to have attacked rulings which related to the action and judgment, on the branch of the case concerning the determination of his alleged rights in and to said land, and had appealed from that part of the judgment only, and the appellate court, in considering such appeal, had confined its inquiries and determination to the portion of the judgment relating to defendant's claim to said ground alone, and reversed the judgment only in its effect against defendant, then, of course, it might have been left in force as an adjudication and determination of the claims of plaintiffs to said ground, this being an action where either party must independently make out a complete case on his own behalf in order to obtain a judgment. But, as we have seen, that was not the character of appeal, nor was the determination so limited on the former appeal of this case. For by that determination the parties were relegated back to the position they occupied when demurrer to the original complaint was under consideration in the trial court.

The ruling of the trial court, therefore, in refusing to strike out the amended complaint, filed after the former reversal, we think ought to be sustained. (*Mattock v. Goughner*, *ante*, p. 300.)

Appellant further contends that the special finding of the jury on the present trial, to the effect that defendant failed to improve said mining claim to the extent of not less than one hundred dollars' worth of work or improvements thereon in the year 1884, was not sustained by the evidence. We have carefully considered the evidence contained in the record relating to this question and from that examination are drawn to the conclusion that the special finding of the jury in that respect is undoubtedly supported by the evidence. Indeed we think a finding to the contrary might be gravely questioned, as to whether with all warrantable liberality of construction, the evidence could be held sufficient to support a conclusion that the necessary work or improvement, to fulfill the requirements of the law, was expended upon said mining claim in the year 1884. The jury found the contrary, and, in our opinion,

such finding is amply supported by the evidence; and that the ruling of the trial court in refusing to disturb that finding ought not to be reversed.

It is further urged that the trial court committed errors of law in giving certain instructions to the jury. The instructions criticised are set forth in the above statement of the case. It is assigned that instruction No. 1 is erroneous, because the court in defining the requisites of a valid mining location, stated, among other essentials, that the locator must, within twenty days after making the location, "file and have recorded in the office of the county recorder of the county in which the claim is located a declaratory statement on oath containing," etc. The clause "on oath" appearing in said instruction is objected to. But in view of the requirements of the statute, and the decisions wherein the same question has been considered, we think the court correctly stated the law. (*Metcalf v. Prescott*, 10 Mont. 283, and cases therein cited.) Instructions No. 3 and 4 are also objected to on the ground that the jury was thereby informed "that it was not necessary for plaintiffs to prove compliance with the law as to performance of annual work on the Great Eastern Claim." By reference to those instructions, it will be seen the jury was thereby told that the pleadings raised no issue in respect to the representation of said "Great Eastern Mining Claim," by proper expenditure in labor or improvements thereon as required by law. The instruction says: "It is not pleaded on the part of defendant that the plaintiffs have forfeited the ground in controversy by reason of a failure to perform the labor or make the improvements required by law, and there is no necessity for plaintiffs to prove such representation."

There being no issue raised on that point by the pleadings, but, on the contrary, the fact of such representation of the Great Eastern Claim being admitted, or not put in controversy, the instruction was correct. (*Wulf v. Manuel*, 9 Mont. 286.) Instruction No. 5 is criticised as erroneous, because "it states that there is no dispute that \$75 worth of work was done on the Miner's Union in 1884, but that as to the remaining \$25, the fact is disputed, and the evidence conflicting." In this connection appellant's counsel say, "it is conceded that \$78.50

worth of work was done in 1884. Jacobs, the plaintiffs' witness, credits Carroll with one day's work, at \$3.50; which, added to the \$75 worth done by Jacobs and Hussleton, amounts to \$78.50; so that the amount left in dispute, and as to which there is conflicting evidence, is not \$25, but \$21.50." Even granting all that appellant claims in this connection with full force, we still deem the language of the instruction void of prejudice on the point of its attempted criticism. The court said to the jury in that instruction, that the dispute was concerning \$25 worth of work or improvements on the claim in that year, in addition to the \$75 worth admitted; in other words, that was the scope of the controversy on that point; and the court did not say that proof of the performance of some, or even all, of that \$25 worth of work had not been made; but the jury were left free to so find, if it could be found from the evidence. It is also urged against this instruction, that, "it is likewise erroneous in exacting too rigid a compliance with the letter of the mining laws," in respect to the amount of work or improvements required for representation. We do not find in this instruction any rigid exaction, which demands from appellant any greater measure than the law requires, in return for the grant of a mining claim. The instruction simply and plainly states what the law requires. There is no error in stating the conditions which must be complied with in order to invest the locator of a mining claim on the public domain with exclusive right of possession, and enjoyment thereof. Nor do we observe any thing rigid or formidable in the form of this instruction. Of course, an instruction which states the requirements of the law may seem quite rigid to one who, by dint of the utmost stretch, cannot show fulfillment. But the objection then is against the law instead of the instruction which states the law; and the law appears rigid only when it lays its rule upon delinquency and finds it wanting. We cannot sustain the objection to instruction No. 5. Lastly, instruction No. 6 is attacked as erroneous, because the jury are thereby told that: "In estimating the amount of work or improvements the test is the reasonable value thereof, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not said work or improve-

ments were reasonably worth the sum of \$100." In this connection appellant's counsel argue that the "intrinsic value or worth of the property may be nothing at all. If the amount of labor put into it was worth \$100 it is sufficient." We do not regard the language of the instruction fairly susceptible of a construction antagonistic to the view of appellant's counsel. Indeed it seems to us that the court is in accord with them in saying to the jury: "In estimating the amount of work or improvements, the test is the reasonable value thereof." The court here said to the jury, it is the reasonable value of the work or improvements, which you must consider. The court certainly did not in that instruction say that the value of the claim with such work or improvements thereon, or the value of the work or improvements to the claim, was the criterion for ascertaining whether the requirements of the law had been fulfilled. And we do not think a jury would be misled in construing or applying the language used by the court, especially in view of the fact that the evidence on that point is directed to the ascertainment of the value of the work or improvements put upon the mine, irrespective of the value of the mining claim; or the propriety or expediency of making the improving, or working it in the manner shown; or inquiring how much it enhanced the value of the claim.

Upon careful consideration of these instructions in the light of the criticism brought to bear on them by the learned counsel for appellant, we think, taken in connection with the other instructions given, they plainly and sufficiently state the law applicable to the case as developed in the pleadings and evidence.

The conclusion of this court, upon all the errors assigned, is that judgment of the court below and the order overruling appellant's motion for a new trial should be affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

13	522
13	532
13	552
15	145
15	509
35*	228
35*	240
35*	243
13	523
15	145
15	509
35*	228
35*	275
35*	739
13	524
16	576
17	490
13	525
13	526
18	364
18	364
13	522
20	191
13	522
22	510
22	512
13	522
31	457

13	522
41	102

STATE, APPELLANT, v. NORTHRUP, RESPONDENT.

[Argued October 15, 1893. Decided December 22, 1893.]

Criminal Law—New Trial—Appeal by state.—An appeal by the state from an order granting the defendant a new trial in a criminal action is not authorized by the third subdivision of section 396 of the Criminal Practice Act, allowing an appeal upon a question of law reserved by the state. (*Territory v. Loun*, 8 Mont. 824, reviewed.) HARWOOD, J., dissenting.

Criminal Law—Information—Murder.—While not necessary to the decision of the case at bar the court expressed its view that an information which otherwise properly and fully charged murder in the first degree should not be held bad where the concluding words simply stated that defendant had committed murder, without stating the acts which he did or that he did them of malice aforethought. (*Territory v. Young*, 5 Mont. 244, cited.)

Appeal from Sixth Judicial District, Park County.

Indictment for murder. Defendant's motion for a new trial was granted by HENRY, J. On motion to dismiss appeal. Granted.

Campbell & Stark, for the motion to dismiss.

I. The third subdivision of section 396 of the third division of the Compiled Statutes of Montana, which relates to appeals by the territory in criminal cases upon questions of law reserved by the state, is in contravention of the constitution of the United States and of the state of Montana, which provides that no person shall be twice placed in jeopardy for the same offense. Section 341, which carries into effect the provisions of chapter 15, would place the defendant twice in jeopardy, and is therefore unconstitutional and void, and it must all fall together. (*State v. Van Horton*, 26 Iowa, 402; *City of Olathe v. Adams*, 15 Kan. 391; *State v. Anderson*, 3 Smedes & M. 751; *State v. Hand*, 6 Ark. 169; 42 Am. Dec. 689; *State v. Burris*, 3 Tex. 118; *People v. Webb*, 38 Cal. 467; *People v. Swift*, 59 Mich. 529, 541; *State v. Crosby*, 17 Kan. 396; 1 Bishop on Criminal Law, § 1026.)

II. There being no appeal allowed by common law, the statutory provisions for appeals in criminal cases by the territory should be strictly construed, and no appeal should be allowed to the state unless the same is expressly allowed by statute. (*United States v. Sanges*, 144 U. S. 310.) There can

be no appeal by the territory until there is a judgment. (Criminal Practice Act, § 395.) In the case of *Territory v. Laun*, 8 Mont. 322, the learned judge says that no appeal can be had until there is a judgment of acquittal. This may be dictum, but it seems to us it is the only construction which can be placed upon it, as section 395 does not provide for appeals from anything but judgments, and, no appeal being allowed by common law, no appeal can be had. In New York, under the Laws of 1852, providing that writs of error should be granted to review any judgment rendered in favor of any defendant upon any indictment for any criminal offense, except where such defendant had been acquitted by a jury, it was held that the court of appeals had not the power to review, by writ of error, an order of the supreme court granting the defendant a new trial, before any judgment had been entered. (*People v. Nestle*, 19 N. Y. 583.) The supreme court of Indiana have passed upon a section similar to ours, and from which we believe ours to have been taken, holding that there can be no appeal until a final judgment is entered in favor of the defendant. (*State v. Hamilton*, 62 Ind. 409; *State v. Spencer*, 92 Ind. 115; *Wingo v. State*, 99 Ind. 343; *State v. Evansville etc. R. R. Co.*, 107 Ind. 581, 583; Elliott's Appellate Procedure, § 272.) The supreme court of this state, in the cases of *United States v. Smith*, 2 Mont. 487, and *Territory v. Rehberg*, 6 Mont. 467, have decided that the defendant cannot appeal until final judgment has been entered; and the same construction must certainly apply to the state.

III. Conceding, for the purpose of this argument, that an appeal may be taken by the territory before final judgment, it can only be taken upon questions of law reserved by the state, not a matter of discretion. If it is a matter of discretion, no bill of exceptions can be taken under section 340 of the Criminal Practice Act; and, if no exception can be taken, no appeal can be had therefrom. The granting of the new trial by the court was a matter of discretion, and not a matter of law. The only true way to determine whether the ruling of the court is a matter of discretion or a matter of law is to see what objections were made by defendant's bill of exceptions, and, if they raise questions of fact, they then become mixed questions of

law and fact, and not questions of law. In this case nearly the entire thirty-eight specifications of error raise questions of fact, and the thirty-third specification of error, upon which the court granted the motion for new trial, raised a question of fact by alleging that the evidence was insufficient to warrant the giving of the instruction. This is a mixed question of law and fact, to which no exception can be taken. (*Kinna v. Horn*, 1 Mont. 597; *Pomeroy's Lessee v. Bank*, 1 Wall. 597; *Territory v. Laun*, 8 Mont. 324.) A question of fact being raised by the thirty-third specification of error, if the court held that the instruction was improperly given, the reason which he gave for so holding is immaterial, and no part of the decision, and should not be reviewed by this court. (*Commonwealth v. Church*, 1 Pa. St. 105; 44 Am. Dec. 112; *McMullen v. Armstrong*, 1 Mont. 486.)

IV. Courts frequently sustain the holdings of the lower court, but upon entirely different reasons than those given by the trial court. (*Pennoyer v. Neff*, 95 U. S. 719; *Black v. Elkhorn Min. Co.*, 3 C. C. A. 312, 52 Fed. Rep. 859.) As we understand the case, should this court conclude that the information is sufficient, and instruction No. 10 not error, it can only order the case remanded, instructing the district court, on the retrial of the case—which has already been granted—to hold the information sufficient, and to give instruction No. 10 upon the retrial, simply for the purpose of determining the law for future guidance. There can be no reversal of the judgment. (*State v. Bartlett*, 9 Ind. 569; *State v. Kinney*, 44 Iowa, 444; Elliott's Appellate Procedure, § 298; *State v. Granville*, 45 Ohio St. 264.) The statute does not confer upon the state a general right to appeal; on the contrary, the right is limited to the classes of cases specified. Hence, it is held that it is only the specific questions properly made and saved that can be considered on appeal. (Elliott's Appellate Procedure, § 278; *State v. Lusk*, 68 Ind. 264.)

John T. Smith, and *E. C. Day*, also for the motion.

I. The state has no right to an appeal from, or writ of error to review, a decision in favor of the accused, except when clearly and expressly authorized by statute, whether that decision is upon a verdict of acquittal or question of law; and the right

exists only when conferred by statute, "expressed in the most plain and unequivocal terms, such as cannot be turned by construction to any other meaning." (*State v. Jones*, 7 Ga. 422; *People v. Corning*, 2 N. Y. 9; 49 Am. Dec. 364; *Commonwealth v. Cummings*, 3 Cush. 212; 50 Am. Dec. 732; *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *Commonwealth v. Harrison*, 2 Va. Cas. 202; *State v. Kemp*, 17 Wis. 669; *State v. Burns*, 18 Fla. 185; *State v. Copeland*, 65 Mo. 497; *United States v. Sanges*, 144 U. S. 310; *State v. Simmons*, 49 Ohio St. 305; *People v. Raymond*, 18 Col. 242; *State v. Croteau*, 23 Vt. 14; 54 Am. Dec. 90.) The right did not exist at common law, and statutes conferring it must be strictly construed.

II. There can be no appeal by the state or the defendant until final judgment, unless the statute expressly provides for such an appeal. (*People v. Bork*, 78 N. Y. 346; *State v. Evansville etc. R. R. Co.*, 107 Ind. 581.) The Montana statute contemplates a final judgment, before the appeal is taken, except where the appeal is from the order arresting judgment. Section 395, Criminal Procedure Act, provides that "an appeal from a judgment . . . may be taken," etc. Section 397: "The appeal must be taken within six months after the judgment is rendered." By section 398, notice must be served upon the clerk of the court "where the judgment was entered, stating that the appellant appeals from the judgment." By section 401, in cases of appeals by the state on reversed questions, the record need contain only "the bill of exceptions and the judgment of acquittal." This question was directly decided in favor of the contention here urged by Mr. Justice Liddell. (*Territory v. Laun*, 8 Mont. 322.) In New York, under the Laws of 1852, providing that writs of error should be granted to review any judgment rendered in favor of any defendant upon any indictment for any criminal offense, except where such defendant had been acquitted by a jury, it was held that the court of appeals had not the power to review, by writ of error, an order of the supreme court granting the defendant a new trial, before any judgment had been entered, (*People v. Nestle*, 19 N. Y. 583.) The only state in which an appeal lies from an order granting a new trial in criminal cases is California, and there by express statutory provision. (Pen. Code, Cal., §§ 1235, 1238.)

III. The state can only reserve such questions for appeal as she may except to. (*Territory v. Laun*, 8 Mont. 322.) These are pointed out in section 340 of the Criminal Practice Act. Under that section, the giving or refusing instructions to the jury can only be excepted to "when the case is finally submitted to them." The court has not yet refused to give instruction No. 11. When he does, the state can then except, and reserve its exception. The exceptions permitted by that section are clearly limited to rulings by the court at the trial, and not to matters occurring after the trial. The state cannot reserve the court's rulings on the information, for the reason that the court has not yet held it insufficient. If the judge's opinion is in this court for any purpose, it shows conclusively that the motion for a new trial was not granted for defects in the information. He simply expressed his doubts as to its sufficiency. The ruling of the court excepted to by the state is the order sustaining the motion for new trial. The state can have no exception to the opinion of the court. (*State v. Bartlett*, 9 Ind. 569. The court's ruling upon the motion for a new trial is a mixed one of law and fact, and involved matters resting entirely within the discretion of the court. The granting of a motion for new trial is largely in the discretion of the court, and that discretion will not be controlled by the supreme court except where it has been abused. (*Kinna v. Horn*, 1 Mont. 597.) The only case similar to the one at bar, that our research has been able to disclose, is that of *State v. Ensey*, 42 Ind. 480, where the court declined to decide whether an exception to a ruling on motion for new trial is such an exception "as constitutes a reservation of a point of law." But the reasoning is against the position. The state has no general right of appeal. Only the specific questions reserved can be considered on the appeal. Only so much of the case must be brought into the record as will enable the appellate court to understand and decide the particular question reserved. (Elliott's Appellate Procedure, § 278 et seq.; *State v. Lusk*, 68 Ind. 264.) The object of this appeal is to procure a reversal of the order granting a new trial. The motion for a new trial was based upon numerous specifications, any one of which, so far as this court can now say, might have been sufficient to sustain the ruling. But, if

this appeal only brings up the reversed questions, this court is not in a position to decide whether the lower court erred or not. It is powerless to render a decision, because it has not the case before it. Surely, it was never contemplated that an appeal could be had in a case where the court could not render a judgment determining the cause.

IV. If chapter fifteen of the Criminal Practice Act be held to give the state the right to appeal in any case, it is unconstitutional, for the reason that the appellate jurisdiction of this court does not extend to criminal cases. The jurisdiction of the supreme court is defined and limited by the constitution, and the legislature can neither diminish nor increase such jurisdiction. (*Ex parte Attorney General*, 1 Cal. 88; *Reilly v. Reilly*, 60 Cal. 625; Haynes on New Trial and Appeal, § 170.) "The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." (Const. Mont., art. viii, § 3.) "Cases at law" do not include criminal cases. (*People v. Johnson*, 30 Cal. 99, 105; 3 Am. & Eng. Ency. of Law, 25.) This court, in the case of *Lloyd v. Sullivan*, 9 Mont. 577, construed this phrase "cases at law" to include special proceedings, referring to article viii, section 11, defining the jurisdiction of district courts, for the constitutional construction of the phrase. That section negatives the idea that "cases at law" include criminal proceedings, for it expressly provides that "the district court shall have original jurisdiction in all cases at law and in equity, . . . and in all criminal cases amounting to felony." The only authority that this court has to review the orders of the district court in criminal cases is conferred by section 2, article viii, which provides that the supreme court shall have a general supervisory control over all inferior courts. But this "supervisory control" is distinct from its "appellate jurisdiction," and cannot add to or take away from the latter.

Henri J. Haskell, attorney general, *H. J. Miller*, and *Allan R. Joy*, for the State, *contra*.

The statute (Criminal Practice Act, section 396) gives the state an appeal from a question of law reserved by the state.

How is this question reserved? Clearly by saving a bill of exceptions. Respondent takes the position that the state has waived its right of appeal because it failed to except (under section 340) during the trial to a decision that was not rendered until some two months afterwards. The statute hardly permits such a construction. This court was created for the purpose of correcting such errors as the one here presented, and is given "general supervisory control over all inferior courts." (Constitution, art. viii, §§ 2, 3.) Respondent pretends that the state's right of appeal should always be denied (however grievous or corrupt may be the rulings of the trial court) until after a verdict of acquittal, when an appeal would be useless except to establish a precedent, which may be likewise disregarded if lower courts have exclusive jurisdiction of a criminal until his acquittal. The court will adopt a construction that will give effect to the law rather than defeat and annul it, and while its duty is to prevent the unjust conviction of any person, it will never encourage crime by erecting new barriers between the convicted criminal and his just punishment. The following cases are cited as conclusive of the state's position. (*State v. West*, 45 La. Ann. 000; *People v. Hawe*, 98 Cal. 648; *Johnson v. State* (Ark., July 1, 1893), 23 S. W. Rep. 7; *Lovett v. State*, 30 Fla. 142; *Vaughn v. State*, 88 Ga. 731; *Byrd v. Commonwealth*, 89 Va. 536; *State v. Jackson*, 44 La. Ann. 160; *People v. Donguli*, 92 Cal. 607; *Young v. State*, 95 Ala. 4; *State v. Blunt*, 110 Mo. 322; *Crist v. State*, 21 Tex. 361; *Halbert v. State*, 3 Tex. App. 660; *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853; *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685; *Territory v. McAndrews*, 3 Mont. 166; *Willingham v. State* (Tex. Crim. App., June 14, 1893), 22 S. W. Rep. 925; *Wilkins v. State* (Ala., June 6, 1893), 13 South. Rep. 312; *State v. Thompson*, 45 La. Ann. 000; *Jackson v. State*, 88 Ga. 784; *Norris v. State* (Tex. Crim. App., May 20, 1893), 22 S. W. Rep. 592; *Lewis v. State* (Tex. Crim. App., May 27, 1893), 22 S. W. Rep. 686; *Gibbs v. State* (Tex. Crim. App., Dec. 21, 1892), 20 S. W. Rep. 919; *Territory v. Johnson*, 9 Mont. 28; *People v. Gonzales*, 71 Cal. 569; *Springfield v. State* (Ala., June 7, 1892), 11 South. Rep. 250; *Scales v. State* (Ala., May 18,

1892), 11 S.uth. Rep. 121; *State v. Parker*, 106 Mo. 217; *Pugh v. State*, 2 Tex. App. 545; *Polk v. State*, 30 Tex. App. 657; *State v. Doyle*, 107 Mo. 36; *State v. Sullivan*, 51 Iowa, 142; *Dillard v. State*, 31 Tex. App. 67; *Davis v. State*, 31 Neb. 240; *State v. Shreves*, 81 Iowa, 615; *State v. O'Brien*, 81 Iowa, 88; *State v. Stockwell*, 106 Mo. 36; *State v. Morrison*, 104 Mo. 638; *Maurer v. State*, 129 Ind. 587; *People v. Bruggy*, 93 Cal. 476; *Johnston v. State*, 29 Fla. 558; *State v. Elliot* (Ohio Com. Pl.) 26 Wkly. Law. Bul. 116).

DE WITT, J.—The defendant was convicted in the district court of murder in the second degree. He moved for a new trial, which motion was by the court granted. From the order granting defendant's motion for a new trial, the state has appealed to this court. The respondent moves to dismiss the appeal on the ground that the law does not permit the state to appeal from that order granting defendant a new trial.

The state took a bill of exceptions to the order of the district court granting the motion for a new trial, and reserved what it contends is a question of law decided (and erroneously decided) by the district court, in granting the motion. Respondent says that the question so decided by the district court was not one purely of law, but one of discretion. (Crim. Prac. Act, § 340.) But this contention of counsel will be passed. In the view that I take of this appeal, I may assume that the question decided by the district court and reserved by the state was one of law purely.

The state bases its claim to the right of appeal upon section 396, Criminal Practice Act, which section is contained in chapter 15 of that act, and which chapter is devoted to the subject of appeals in criminal cases. That section is as follows:

"SEC. 396. Appeal to the supreme court may be taken by the state in the following cases, and no other: 1. Upon a judgment for the defendant in quashing or setting aside an indictment; 2. Upon an order of the court arresting the judgment; 3. Upon a question of law reserved by the state."

The state takes its appeal under what it claims is the authority granted by the third subdivision of the section just quoted.

We may start with the settled proposition of law that the state has no appeal in criminal cases, unless the same is expressly granted by law. This is the law of almost all the courts of this country. (See cases cited by counsel on this argument.)

Mr. Justice Gray, of the United States supreme court, says, after reviewing the English decisions: "But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal or upon the determination by the court of a question of law." (*United States v. Sanges*, 144 U. S. 312.) The learned justice then reviews the American authorities upon the subject.

I am satisfied with the reasoning and authority of the eminent tribunal rendering that decision, and of the distinguished courts cited by Mr. Justice Gray. In the same line of thought is the following language of this court in *Territory v. Laun*, 8 Mont. 325:

"The right of appeal by the state should be strictly construed and limited to those instances mentioned; and that such was the intention of the legislature is most evident, or it would never have used the emphatic language found in section 396 of the act referred to, where it says, 'appeal to the supreme court may be taken by the state in the following cases and no other':"

I will, therefore, direct my inquiry to a determination of whether section 396, subdivision third (in connection with the whole of chapter 15 of our Criminal Practice Act), gives the state the right of appeal from an order of the district court granting defendant's motion for a new trial. That section and subdivision third give an appeal "upon a question of law reserved by the state." That section does not itself provide how the question of law is to be reserved, but I think that this is made clear by sections 401 and 340, Criminal Practice Act. Section 401, found in the chapter 15, above noted, provides as follows:

"SEC. 401. In case of an appeal from a question reserved,

on the part of the state, it is not necessary for the clerk of the court below to certify, in the transcript, any part of the proceeding and records, except the bill of exceptions and the judgment of acquittal. When the question reserved is defectively stated, the supreme court may direct any other part of the proceedings and record to be certified to them."

This section thus has in view an appeal under the provisions of the third subdivision of section 396, that is to say, upon the question of law reserved; and it provides for bringing the bill of exceptions to the supreme court, and if the bill of exceptions defectively states the question of law reserved, the court may direct other portions of the record to be certified up. This seems to contemplate the reserving of the question of law by a bill of exceptions.

Turning to section 340, Criminal Practice Act, we find it provides that, "The district attorney, or any counsel for the state, may except to any decision of the court upon a question of law, in admitting or rejecting witnesses, or testimony, or in deciding any question of law, not a matter of discretion, or in giving or refusing any instructions to the jury, when the case is finally submitted to them."

Thus we here find matters to which the state may except. They are defined specifically and are not as extensive as the rights of exception given to a defendant for, "exceptions may be taken by the defendant to any decision of the court upon matters of law affecting his substantial rights." Among the exceptions given to the state (section 340) is not one given in terms to an order granting a new trial to defendant. Of course, I understand that the language of section 340, "in deciding any question of law not a matter of discretion," is broad enough to include an exception to an order granting defendant a new trial, if such an order decides a pure question of law, not of discretion. But I suggest these views of section 340 simply as a tendency of the intent of the Criminal Practice Act (taken in connection with the more pointed expressions of the intent, which I will review below) to exclude the appeal by the state from an order granting a new trial to a defendant. For it is observed, that section 340 descends into details in some matters; for example, it mentions a decision in admitting or re-

jecting witnesses or testimony, and in giving or refusing instructions. The granting of a new trial is a decision as important and vital as are those specifically mentioned in section 340. Indeed it is a decision of such prominence in the case, that I have found no court ever holding that an appeal could be taken from it, unless specially authorized by statute. California is the only state in which I find that the statute provides for such an appeal, and that state seems to have had such statute since its organization.

Therefore if our legislature had intended that an exception could be taken to such an order, as laying a foundation for appeal on a question of law reserved, it would seem, in view of the history of jurisprudence on this subject, that it would have been natural that such order be mentioned specifically in section 340. As above noted, these considerations do not at all conclude my views as to the appealability of the order. But they do indicate a tendency of expressed intent, not out of line with the direct expressions of the legislature, which I shall examine later in this opinion.

I am of the opinion that if the state wishes to have reviewed a question of law reserved under the provisions of section 396, third, it must be done upon an appeal from the judgment. Such is indicated to have been the opinion of this court in *Territory v. Laun*, 8 Mont. 324, in which Mr. Justice Liddell, for the court, says: "This last ground," that is to say, upon a question of law reserved by the state, "is evidently the law under which the present appeal is prosecuted; and in order that the territory can have this appeal considered, it must show by the record that there is a question of law to be decided, not within the discretion of the trial judge, and that the appeal is prosecuted from a judgment."

The view is thus expressed, that a question of law reserved is to be considered by this court only upon an appeal from a judgment. An order granting a new trial is not a judgment. I do not consider that those remarks in *Territory v. Laun* were necessary to the decision of that case, and are therefore not now controlling; but, as far as *dictum* may suggest, what may be the opinion of the court, the language in that case shows the tendency of the view of this court at that time (1889).

As noted above, the right of appeal by the state must be strictly construed (*Territory v. Laun*, 8 Mont. 324), and must be granted by express statute. (*United States v. Sanges*, 144 U. S. 310.) If the right is given at all by statute, it is granted by section 396, third. (*Territory v. Laun*, 8 Mont. 324.) That section and subdivision provide that the appeal may be taken by the state "upon a question of law reserved." I think that they refer to the subject matter, to be reviewed on the appeal, to wit, a question of law reserved by a bill of exceptions, and do not purport to describe from what the appeal is to be taken, whether from an order or the judgment. The appeal is upon a bill of exceptions carrying up the question of law. The bill of exceptions is a vehicle by which the alleged error is conveyed to the appellate court for consideration. I am therefore of opinion that the section and subdivision describe the subject to be reviewed, and the method of preserving it for review, and do not provide whether the subject so preserved for review shall be considered by the appellate court by an appeal from the order of the district court which erroneously decided the question of law, or whether by an appeal from the judgment in the case.

But examining the whole of chapter 15, in which is found section 396, we find much light as to the practice laid down for bringing up for review the question of law reserved. This chapter 15 is upon the subject of appeals in criminal cases generally, and is composed of section 394 to section 409, Criminal Practice Act. Every thing that is said in the chapter is as to appeals from a judgment. There is nothing as to an appeal from an order granting a new trial.

Section 395 is, in orderly consideration, the introductory section of the chapter, although it appears as the second section. It reads as follows:

"SEC. 395. An appeal from a judgment in a criminal action may be taken in the manner and in the cases prescribed in this chapter."

Here we find an appeal from the judgment is provided for, and it is "in a criminal action," including, apparently, appeals by both the state and defendant.

Next in proper order should be read section 394, as to appeals by defendant. That is as follows:

"SEC. 394. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and upon appeal any decision of the court or intermediate order made in the progress of the case may be reviewed."

So it appears that the defendant must appeal from the judgment, and thereupon intermediate orders may be reviewed.

Then comes section 396, which is cited above in full as to appeals by the state. Then we may consider section 397:

"SEC. 397. The appeal must be taken within six months after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken."

Here the time within which the appeal may be taken is fixed. It is within six months after the judgment. If an appeal may be taken from an order granting a new trial, when is it to be taken? The statute is silent; and it is silent, in my opinion, because it did not contemplate such an appeal.

"Appeals are matters of statutory regulation. There must be a substantial compliance with the statute in order to confer jurisdiction upon the appellate court. The appellant is charged with the duty of perfecting his appeal in the manner provided by law, and error in this regard affects the jurisdiction of the appellate court. (*Courtright v. Berkins*, 2 Mont. 404.)" (*Territory v. Hanna*, 5 Mont. 247, cited in *State v. Gibbs*, 10 Mont. 210.)

But we find no statutory regulation for taking an appeal from an order granting a new trial in a criminal case. If chapter 15 had intended to allow an appeal from such an order, it seems that it would not have been wholly silent as to the time in which it might be taken. What practice is the state to follow? When shall it take its appeal? How is this court to determine whether it is taken in time? The legislature surely did not intend to leave all these questions open. I do not think of any other instance where the statute has given an appeal and omitted to provide a time in which it is to be taken.

We also next observe that there is no method laid down for taking such an appeal. Section 398 provides as follows:

"SEC. 398. An appeal is taken by the service of a notice

upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the attorney prosecuting. If taken by the state, a similar notice must be served upon the defendant, if he can be found in the country; if not found, by posting up a notice three weeks in the clerk's office."

Thus it appears that the notice of appeal is to state that the appellant appeals from the judgment. There is no provision for a notice of appeal from an order granting a new trial. The remarks above made as to section 397, are also in point as to section 398.

Section 399 is as follows:

"SEC. 399. An appeal taken by the state in no case stays or affects the operation of the judgment in favor of the defendant until the judgment is reversed."

Here, again, the judgment seems to be in contemplation, and not an order granting a new trial.

Section 401, which I have quoted above, regulates the preparation of the record on appeal. There should be certified up a bill of exceptions, and the judgment of acquittal. Here again we find the judgment only in contemplation.

Section 404 provides: "The appellate court may reverse, affirm, or modify the judgment appealed from." Here, again, the indication is that the judgment alone is appealed from.

So, throughout the whole of this chapter 15, every expression indicates that the legislature intended that the appeal should be from the judgment. The whole chapter is *in pari materia*, and is to be construed with section 396, third, which is a part thereof. To hold that the state may appeal from an order granting a new trial, I think, would not be in accord with the expressed general intent of chapter 15, in view of all of its provisions and the history of judicial decisions upon this subject. The question is not without difficulty. I have approached its consideration with preconceptions opposed to the view which I now feel compelled to entertain and express. It is true that this view debars this court from reviewing an order of the district court granting a defendant's motion for a new trial. I believe it would be well if such review could be

had upon questions purely of law, but that is for the legislature, and to their wisdom I commend the consideration of the subject. In this particular case at bar, a review of the order of the court below would be an advantage, for I doubt that this court would be able to agree to the correctness of the ruling of the district court as to instruction No. 10, in connection with other instructions given.

I do not think that the district court, even in effect, quashed or set aside the information or arrested the judgment. The motion of the defendant was for a new trial. In granting the motion the judge expressed doubts as to the sufficiency of the information, but the order of the court did not expressly set aside the information; nor was the effect of the order to set it aside or to arrest the judgment. (Crim. Prac. Act, § 357.) The order granted a new trial, and the effect of this order is to place "the parties in the same position as if no trial had been had." (Crim. Prac. Act., § 353; *State v. Thompson*, 10 Mont. 562.) Therefore, in the case at bar the order granting the new trial left the case standing for trial upon the information as filed. The granting of a new trial materially differs, in effect and results, from arresting the judgment. The granting a new trial goes back to the information, and wipes out the proceedings subsequent to the information. It lifts up the case and sets it back to the information for a new start at that point. On the other hand, an arrest of judgment cuts deeper. It attacks the foundation. It destroys the information (Criminal Practice Act, section 359) on the ground: 1. That the offense is not within the jurisdiction of the court; or, 2. That the facts stated do not constitute an offense. (Crim. Prac. Act, § 357.) The order arresting judgment is more of the nature of a final judgment; in fact, quite of that nature. It leaves the defendant with no charge standing against him. (Crim. Prac. Act, § 359.) To be sure he may be held to answer a new information (Criminal Practice Act, section 360), if there is reasonable ground to believe that he can be convicted of any offense. But this simply puts him about where he would be if committed by a magistrate on preliminary examination, if there was probable cause to believe that he was guilty of any criminal offense. (Crim. Prac. Act, § 96.) I add these

remarks in view of a possible application of the decision in this case to a construction of subdivision 2, section 396, Criminal Practice Act, which provides for an appeal by the state "upon an order of the court arresting the judgment." Regarding the substance of things, such an order is, in its nature and results, a judgment for defendant. It is a denying a judgment to the state, and a discharge and acquittal of defendant from any possible consequences that threatened to flow from the information. I am therefore of opinion that nothing said in this opinion looks to a denial of the right of the state to appeal under the provisions of subdivision 2, section 396, Criminal Practice Act.

In this connection, and in consideration of the matter to which I shall now call attention, I think that it is proper that we express our view as to the sufficiency of the information. The ruling of the court in granting the new trial was made in such a peculiar manner that the state's attorneys have construed it to be an attack upon the information, and there is reason to believe from the record that the district court would hold the information to be bad if that matter were regularly before it for a decision. The sufficiency of the information is not a matter to raise upon a motion for a new trial (Criminal Practice Act, section 354), but it may be raised on a motion in arrest of judgment if the defects exist which are set forth in section 357, Criminal Practice Act. Insufficiency of the information was not specified by defendant as one of the grounds of the motion for a new trial, nor was that matter before the court by virtue of that motion. (Crim. Prac. Act, § 354.) But no motion of any kind is necessary that the court may arrest the judgment. The court may do this without motion. (Crim. Prac. Act, § 358.)

Now, on the motion for a new trial of this case, we find the court going outside of that motion and entering the domain of the motion in arrest of the judgment, which domain it may enter without being moved to do so by either party. (Crim. Prac. Act, § 358.) Having entered this field, we find, by the record, that the judge strikes nearly a direct blow at the information. It is fairly to be gathered from his ruling that he considers the information insufficient to sustain a judg-

ment on the verdict. It is true that he makes this a ground for granting a new trial, as he ought not, and he does not make it a ground for an arrest of judgment, as he should have done if he held that the information was objectionable under section 357. The ruling was not one that was attentive to the practice, and it did not distinguish the nature of the matter which the court undertook to handle. It threw the case into some confusion, and has left the counsel for the state in uncertainty as to how they will stand as to their information. For the state's attorneys come into this court in the belief that the information was attacked, and they devote most of their argument to its defense. This case is now to go back for trial. It will stand upon an information which has been impugned in the opinion of the district court. The state's attorneys may, therefore, naturally be shaken in their confidence in the sufficiency of their pleading. Therefore, although, in fact and effect, the district court did not arrest the judgment, and therefore did not destroy the information, and hence the information is not before us for review, yet as all subsequent proceedings must rest upon this information, which, in the opinion of the court which is to try the case, is, if not decided to be bad, at least much discredited, we deem it proper and fair to both court and counsel to express our views as to the sufficiency of this pleading.

The counsel for the respondent does not show in his brief wherein the information was ever claimed to be insufficient, nor does the ruling of the court enlighten us upon that point. The judge says, simply, that he believes the information is insufficient to sustain a judgment of murder in the second degree. But, upon the argument of the case, we were told that the information was faulty in its conclusion. If we examine the information without regard to the concluding sentence, there is no contention but it charges murder in the first degree. It describes the acts done and the killing, and alleges that those acts were done feloniously, unlawfully, premeditatedly, and with malice aforethought. An information charging murder in the first degree is a good information to sustain a judgment on a verdict of murder in the second degree. (*Territory v. Stears*, 2 Mont. 324.) Therefore the information is sufficient to sus-

tain a judgment for murder in the second degree, unless the objection which counsel urged to the conclusion is good. That conclusion, which is in a sentence by itself at the end of the indictment, is as follows:

“And so the county attorney aforesaid, upon his oath aforesaid, does give the court to understand and be informed that the said Charles Northrup at the time and place aforesaid, and in the manner aforesaid, did commit the crime of deliberate, premeditated murder, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Montana. Allan R. Joy, county attorney of Park county, state of Montana.”

The argument upon this matter was very brief, and about all that was claimed was that the language of this conclusion stated simply that the defendant had committed murder, and did not state the acts which he did, or that he did them of malice aforeshought. But the acts constituting the offense and the manner of performing them, and all the allegations of premeditation and malice aforeshought, had been fully and unobjectionably set forth in the preceding portion of the information, and the portion of this information which is now criticised is a mere conclusion resulting from the previous allegations. The conclusion states that “at the time and place aforesaid and in the manner aforesaid.” This point was directly decided in the case of *Territory v. Young*, 5 Mont. 244, in which Chief Justice Wade says:

“These words are the mere conclusion drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires, by proper averments, the formal concluding words are immaterial. At common law the concluding words, formally charging the defendant with murder, were necessary in order to distinguish an indictment for murder from an indictment for manslaughter. If the term ‘murder’ were omitted from the conclusion of the indictment the defendant could only be convicted of manslaughter. (3 Chitty’s Criminal Law, 737; *Fouts v. State*, 8 Ohio St. 119, 120.)

“The reasons for the technical conclusion of indictments for murder at common law all disappear under statutes defining

the degrees of the crime, and providing that the jury shall designate the degree in their verdict. And so we are compelled to say that this indictment is clearly within the Stears and McAndrews decisions, and those decisions we cannot disturb. This conclusion seems irresistible when we remember our statute, which provides that no indictment shall be quashed or set aside for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged, or for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant on the merits."

The statutes to which the above opinion refers are now section 171, subdivisions fourth, sixth, and seventh, Criminal Practice Act. The information in the case at bar clearly contains sufficient matter to indicate the crime and the person charged, and the objection which is now raised to it is not as to matter which tended to the prejudice of substantial rights of the defendant upon the merits. We are therefore of the opinion that the objection to the sufficiency of the information is not well founded.

The contention at the bar has been very earnest and vigorous on both sides. I have not, in this opinion, quoted or analyzed all the authorities which the zeal and learning of counsel have collected in their briefs. I have cited the general principles of the cases, and have then thought that the determination of this case depends upon an interpretation of our chapter 15, Criminal Practice, in the light of the legal principles established by the decisions. (See cases cited in the briefs of counsel.)

It is ordered that the appeal be dismissed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*dissenting*).—In so far as the majority of this court have entertained this appeal to review the ruling of the trial court in holding the information insufficient, I am in accord with them. But how far that has been done, and why it was done, I apprehend will be a perplexing problem for reporter, annotator, practitioner, and judge, in view of the incongruity manifest in reviewing the information and condemn-

ing the ruling of the trial court thereon as erroneous, and yet prefacing such review with the observation that "although in fact and effect the district court did not arrest the judgment, and therefore did not destroy the information, and hence the information is not before us for review." It seems to me bad enough for an appellate court to review and announce opinions upon matters *not before us*, but here must be something worse, if the court's views are tenable, for it is not only affirmed that the matter reviewed is not before this court, but that the ruling reviewed never was made at all. Yet proceeding, the court enters upon a discussion of the virtue of the information, and appears to condemn as erroneous the ruling of the district court that the information was insufficient. But in closing, the appeal is dismissed, thereby again affirming in effect that this court has no jurisdiction thereof.

I cannot concur in such a treatment. The appeal presents two questions of law, on consideration of which the trial court vacated the verdict of the jury finding defendant guilty of murder in the second degree, both of which questions of law, in my opinion, are, by virtue of the provisions of the statute, brought within the jurisdiction of this court for review and determination by this appeal. The first question of law for review is the ruling of the trial court to the effect that the information is insufficient to support the verdict; and as to that ruling, it appears to me there can be no well-founded doubt that it is fully within the jurisdiction of this court to review, and ought to be authoritatively passed upon and a determination announced. Such review and determination on that point I have urged in the councils of this court as proper, and that such determination could be made in a homogeneous treatment of the case, along with the holding of the majority, that the other question of law which pertains strictly to the motion for new trial is not subject to review on this appeal.

Let us set clearly in view the conditions which gave rise to this appeal and the questions of law which appellant seeks to have reviewed and determined thereby.

Defendant was by information charged with the commission of the crime of murder in Park county; has been twice tried thereon, and upon the second trial was by the jury's verdict

found guilty of murder in the second degree. Thereupon motion for a new trial was made on behalf of defendant and granted by a court order as follows:

"In this case, although many errors are assigned, there are but two which I consider of sufficient importance to notice in passing upon what I consider the merits of the motion for new trial. I am satisfied that the case was fairly presented to the jury, that the evidence was sufficient to sustain the verdict, and that there was no error in the instruction of the evidence of the argument of counsel. The two objections which I have referred to as being worthy of notice are: 1. The objection to the sufficiency of the information; and, 2. The objection raised to the instruction given by the court, number ten (10). There are grave doubts in my mind as to the sufficiency of the information to support a verdict of murder in the second degree, and although I would not feel like granting a new trial upon this objection standing alone; still, when taken in connection with the instruction given by the court, number ten (10), already referred to, I am disposed to grant a new trial. Instruction number ten (10) takes away from the jury the consideration of whether or not the defendant acted upon what he believed to be actual danger at the time, and estops the jury from considering the question as to whether the defendant really believed himself to be in danger, although he might afterwards turn out to be mistaken in such belief, and although the court gave a further instruction, number twenty-one (21), explaining that the danger need not be real, but only apparent, still the court is unable to say that the jury might not have been misled as to this instruction. Therefore, for these two reasons, the motion for a new trial in this case is sustained."

Exceptions to this ruling of the court, both as to holding the information insufficient and in holding instruction No. 10 erroneous, was reserved by the state. The instruction in question reads as follows:

10. "Before a person is justified in taking the life of his assailant the slayer must not only exhaust all other reasonable means within his power consistent with his own safety to prevent the homicide, but it must clearly appear that the party

slain not only had at the time the present ability as well as the intention to kill or seriously injure the slayer at the time, and that deceased was then and there in the act of carrying out this purpose, to wit: the intention to destroy the slayer or of inflicting upon him serious bodily injury, and even then it will not justify the slayer in the use of any more force than is actually necessary at the time to prevent the deceased from immediately carrying into effect such unlawful purpose. By this instruction the jury will understand that the right to take life is limited to the actual and present necessities then suddenly precipitated by the assailant under such circumstances as to place the life and person of the slayer in such peril as admit of no other reasonable alternative than the killing of the assailant, and even then the slayer's right to employ force against the assailant is limited to the force necessary to repel the violence then being offered, and to place himself beyond the reach of immediate danger. The law of self-defense will not allow the slayer to go beyond this limit, and although the attack may be violent, unwarranted, and felonious, and made with the apparent intent to kill, yet, whenever this danger is removed as by disarming the assailant or by overpowering him by the interference of others, then the right of the person assailed to use force ceases, and for the same good reason where the assailant retires from the conflict, or pauses in his advance or turns away before committing any violence, a person though violently attacked would not be justified in killing while his assailant was hesitating or pausing in his attack, or was retreating or plainly evincing a desire on his part to discontinue all further violence, and in this case, even though you may believe from the evidence beyond a reasonable doubt that the deceased was advancing to attack defendant just prior to the shooting; still, if you are further satisfied from the evidence beyond a reasonable doubt that before the fatal shot was fired deceased ceased the attack, or turned away, or in any manner plainly manifested his desire to avoid any further violence, or was attempting to escape from the defendant at the time the fatal shot was fired, then defendant had no occasion to take the life of deceased, and you will bring in your verdict of guilty"

Instruction No. 23, given along with No. 10, and referred to in the order of the court, is as follows:

23. "You are further instructed, as a matter of law, that, if a person believes, and has reasonable cause to believe, that another has sought him out for the purpose of killing him, or doing him great bodily harm, and makes demonstrations manifesting an intention to commence such attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary until he has secured himself from danger, and if in so doing it is necessary to kill his antagonist, the killing is excusable, on the grounds of self-defense."

The ruling of the court touches two questions: the sufficiency of the information, and the sufficiency or correctness of said instruction. These are both purely questions of law. Whether the information is sufficient in law to charge defendant with the commission of said crime, is a question of law. And likewise an instruction stating the circumstances or conditions under which the law will justify homicide is purely a matter of law. Indeed, the statute defines those circumstances, or conditions, under the pressure of which the law will justify homicide. The fact as to whether such conditions existed or not, in a particular case under inquiry, is, of course, a question of fact for the jury to find. Therefore, it is seen that the two points upon which the court made its ruling, overturning the results of the trial, and, as the prosecuting officer construed it, also overturning the information, were purely questions of law. The state having reserved an exception to this ruling, appealed to this court, asking a review and determination of those important questions of law.

Respondent interposed a motion to dismiss this appeal on the ground that there is no law authorizing an appeal on the part of the state until after final judgment of acquittal is entered in the trial court, and this motion to dismiss the appeal is the subject of the present consideration; although the whole case was argued and submitted along with the motion to dismiss.

The consideration of this question may be premised with the observation, that according to a preponderance of American

authority an appeal cannot be taken on the part of the state in a criminal case without statutory provision therefor. Mr. Bishop summarizes his investigation of this question of criminal procedure in the following remarks:

"Rights of state to have proceedings reversed. In England writs of error, the practical object of which is generally to bring whatever appears of record under the review of a higher tribunal, seem to be allowable to the crown in criminal causes; but the courts of most of our states refuse them, and refuse the right of appeal to the state or commonwealth, except where expressly authorized by statute, as in some states they are. In Maryland the state may have a writ of error at common law to reverse a judgment given on demurrer in favor of a defendant. And in some other states questions of law may, without specific statutory direction, be reviewed by this proceeding, or by appeal, on prayer of the state. The question is not free from difficulty; but probably some judges have refused the writ to the state, from not distinguishing sufficiently between cases in which the rehearing would violate the constitution and cases in which the prosecuting power has the same inherent right to a rehearing as a plaintiff has in a civil suit." (1 Bishop's Criminal Law, § 1024.)

We therefore go directly to the statute with the question to find whether provision has been made for such an appeal, and there find it provided, that: "Appeals to the supreme court may be taken by the state in the following cases, and no other:

"1. Upon a judgment for the defendant in quashing or setting aside an indictment.

"2. Upon an order of the court arresting the judgment.

"3. Upon a question of law reserved by the state." (Crim. Prac. Act, § 396.)

It is seen that the statute expressly provides for an appeal by the state from the action of the trial court in quashing or setting aside an indictment. Under the present law and practice in criminal cases, as re-formed by the constitution and statute, the information is equivalent to an indictment, and said provisions of statute apply thereto. The state's attorney construed said order of the court as quashing or setting aside the information as insufficient to "support a verdict of murder in

the second degree" of which defendant had been convicted; and points to the express provision of the statute providing for an appeal from such determination of the court. The only attempt to avoid the direct force of that statute is by mere argument, that the question of insufficiency of the information was not before the trial court on the motion for a new trial. It is true that question is not strictly germane to the motion for new trial. (Crim. Prac. Act, § 354.) And for that reason alone this court appears to hold that what was actually done was not done, simply because "the ruling was not one that was attentive to the practice, and it did not distinguish the nature of the matter which the court undertook to handle." And so this court holds, against all authority and reason too, as it seems to me, that when the trial court does indirectly something which would be reviewable on appeal, if done directly, the appeal and jurisdiction to review is cut off. The logical result of this is, that, as often as a trial occurs, the court may annul the result by holding the indictment or information insufficient, and if this is done on motion for new trial such ruling is not reviewable, and the appeal will be dismissed. But if the court should hold the indictment had on some motion which gave nice attention to the rules of practice this court then admits that in such case the statutory provision making such ruling reviewable on appeal would have its effect. That statute could, however, be set aside at any time by indirection or by creating a little confusion on the subject of practice. But is the learned trial court subject to the strictures thrown upon its rulings when viewed in the light of the statute? It is clear that the trial court followed the plain path of the law. When the motion for new trial was committed to the consideration of the trial court there was also raised the question of the sufficiency of the information to sustain the conviction. This was a question which can be raised at any time before judgment, and not only raised by motion, but the court, on its own motion, may consider that question. (Crim. Prac. Act, § 358.) But according to the language of the order of court above set forth, "objection" was raised "to the sufficiency of the information." The court says, "the two objections which I have referred to as being worthy of notice are: 1. The ob-

jection to the sufficiency of the information" etc. The tendency of this language seems to me to indicate that "objection to the sufficiency of the information" was made. Nevertheless whether it was raised by counsel or considered by the court, on its own motion, there is the authority of statute for the practice.

Therefore, while that objection was not germane to the motion for new trial, it was before the court at the same time, and was ruled upon. The court expressed "grave doubts as to the sufficiency of the information to support a verdict of murder in the second degree," and on that ground, coupled with the criticism of an instruction, vacated the verdict, and granted a new trial. If the court groups together these matters directly placed within the province of its consideration at the time, and bases his action in vacating the verdict on the insufficiency of the information," shall it be said that the court did not do what it plainly has done, simply because all the grounds of the order were not especially pertaining to the motion for new trial? And that no appeal lies to review the ruling which the statute plainly makes reviewable on appeal, because that ruling was made in connection with other considerations? The situation is, therefore, peculiar, considering that this court holds that no appeal lies, and declines to authoritatively determine whether the information is good or whether the criticisms of the court below respecting the same are well founded. Suppose that upon another trial the state should again convict defendant and motion be made to vacate the verdict and grant a new trial, and the court should grant the same, observing that he had once held the information insufficient and that ruling had not been reversed. Consistency alone might dictate such a ruling on the part of the trial court. Nor could any blame for this extraordinary result rest upon the prosecuting attorney, because he appealed and sought review of the order which determined the information insufficient. In refusing to entertain this appeal and review the ruling of the trial court, in so far as that ruling impugns the sufficiency of the information, it seems to me this court disregards the substance and effect of things, and proceeds upon mere verbal distinctions without substantial ground. And I am unable to find,

either in the argument of counsel in support of the motion to dismiss, or in the opinion of the majority of this court, any ground for refusing such review.

As to a review of the question of law involved in the ruling of the trial court, that instruction No. 10 delivered to the jury was erroneous, there is also provision of statute for appeal therefrom found in the third subdivision of section 396, that the state may appeal "upon questions of law reserved by the state." This is the direct provision, and if given force would make such appeals available to review questions of law analogous to the method of bringing up questions of law by writ of error. But this court holds that an appeal cannot be taken to review such questions of law reserved by the state as provided in subdivision third of section 396 until there has been a judgment of acquittal; and, of course, the mischief of the "error of law" is irremediable. So that if on an error of law alone an order for new trial, or any other order, however vital to the proceeding, is granted over and over again, there can be no review until it has resulted in a judgment of acquittal. But that holding on this branch of the case has an implication of statute to support it, and the majority of this court, as it appears to me, have given this implication the effect of annulling the express provision allowing appeals "upon questions of law reserved by the state" in many cases of criminal prosecution; and the effect, in all cases, of adding to that provision the words, "after judgment of acquittal." Both of these effects of the ruling of this court stand directly in contradiction of the rules of construction of statutes. For instead of making the express provision of the statute yield to the mere implication, or "sacrificing the spirit to the letter," the contrary is the rule of construction; and likewise the rules of construction forbid an interpretation which in effect adds or inserts into the statute any words or provisions. (Code Civ. Proc., sec. 630.)

Such construction of the statute is not only forbidden by sound rules of interpretation, but, it seems to me, a moment's reflection and consideration of those provisions of the statute standing *in pari materia* would lead to a different view.

The holding of the majority is, that no appeal lies on the part of the state until there is a judgment of acquittal; and

hence there is no appeal as provided by statute "upon questions of law reserved by the state," if that error was given effect in an intermediate order overturning a conviction until the result is an absolute acquittal. Such is the effect of the observations in *Territory v. Laun*, quoted in the majority opinion, but acknowledged to be *obiter dictum*; and on that *dictum*, and the implication of the provisions of the statute following section 396, the holding of this court is based.

Now, with all due respect to the *obiter dictum* referred to, and also being mindful of the implication found in certain sections of the statute providing the manner of taking appeals, we cannot escape the fact, that the statute directly and expressly contradicts that *dictum* by providing for an appeal from an intermediate *order* where there is not, and, in the very nature of the case, cannot be, a judgment of acquittal. The statute provides for an appeal by the state "upon an *order* of the court arresting the judgment." (2 subd., § 396.) This is an intermediate order before there is any judgment, much less a judgment of acquittal. How then can this court quote and follow the *dictum* of *Territory v. Laun*, 8 Mont. 324, "that in order that the territory can have this appeal considered, it must show that the appeal is prosecuted from a judgment?" Or how can this court hold, on the mere implication of the subsequent sections of the statute, that the appeal must always be accompanied by a judgment? Does not that holding contradict the plain intent, and not only so, the positive and express provision of the statute so plainly declared, that there is no room for interpretation? The legislature has said, by direct provision, there shall be an appeal by the state from an *order* refusing to enter judgment, but this court says that the appeal must be prosecuted from a judgment in all cases. And a logical following of that construction will deny an appeal from "an order arresting the judgment." For if an appeal is entertained from an order arresting a judgment, such appeal will not be "from the judgment"; nor by service of notice of appeal upon the clerk of the court "where the judgment is entered"; nor will it affect or stay the "operation of the judgment," because when an appeal is taken from an order arresting judgment, no judgment will have been entered in contem-

plation of law. And so all the implications and *dicta* which the majority opinion has drawn together to support this dismissal will apply just as forcibly to dismiss an appeal from an order in arrest of judgment; and thus annul also the express provision of subdivision two of section 396, that the state may appeal from an *order* of the court arresting the judgment.

I do not find any support for the ruling of this court in denying a review of the order of the court below, in so far as it impugns the sufficiency of the information. Nor do I find sufficient strength in the *dicta* and implications pointed out to overthrow the direct, positive provisions of the statute authorizing an appeal "upon questions of law reserved by the state."

The framers of the statute undoubtedly intended that questions of law reserved by exception should be reviewed on appeal as upon writ of error, which was a well-known practice for review of errors of law. And that practice was undoubtedly in the mind of the framers of the provision that the state may appeal "upon errors of law reserved by the state," found in the third subdivision of section 396, and viewed in the light of such analogy, it is without difficulty. The intention of the legislature in that provision is demonstrated by the history of the rulings of courts upon this point of criminal procedure. That ruling has been quite uniform in American jurisprudence that no exception, or appeal, or review by writ of error, was allowable on behalf of the state without express provision of statute therefor. Hence, the legislature provided in the criminal practice act for review of "a judgment quashing or setting aside an indictment"; "an order of court arresting the judgment," and of "questions of law reserved by the state." This statute is refused effect, because the legislature did not provide an appeal from an order granting a new trial. It seems to me the observation that "if our legislature had intended that an exception could be taken to such an order (an order for new trial) such order would have been made appealable," manifests an entire misapprehension of the meaning and intent of the legislative provision. I think there is no doubt that if the framers of that statute had intended to provide for an appeal from an order granting a new trial provision would have been made to that effect. But it is manifest that the legislature did

not so intend. New trials are frequently granted on discretionary considerations, and it is clear, from section 340 of the **Criminal Practice Act**, that it was not the policy of the legislature, in its wisdom, to make matters of discretion resolved in favor of the prisoner by the trial court reviewable on appeal by the state. Hence the legislature did not provide that an order granting a new trial to the prisoner should be appealable, because such provision would put upon review all the grounds of the order. Of course under the usual rules of appellate review, discretionary rulings are allowed to stand unless abuse is plainly shown. The legislature, however, left that responsibility entirely with the trial court. But to the end that the *law* might be administered, and administered uniformly throughout the state, the legislature provided for review of questions of law ruled upon by the trial court against the prosecution. And these ought to be reviewed and determined even if another trial was granted on discretionary grounds, so that errors of law might not intrude their influence into the case until possible miscarriage of justice is wrought thereby. In my humble opinion the manifest wisdom and intention of the legislature is set aside in the holding of the majority, in refusing to review and determine the questions of law brought here for review by this appeal.

STATE, APPELLANT, v. BLOOM, RESPONDENT.

[Argued November 16, 1893. Decided December 23, 1893.]

See *syllabus* and opinion in the case of *State v. Northrup, ante*, page 522.

Appeal from Sixth Judicial District, Park County.

On motion to dismiss appeal. Granted.

John T. Smith, and E. C. Day, for the motion.

Henri J. Haskell, attorney general, H. J. Miller, and Allan R. Joy, contra.

DE WITT, J.—This is an appeal by the state from the order of the district court granting defendant's motion for a new

trial. The defendant moved to dismiss the appeal on the same grounds as a similar motion was made in the case of *State v. Northrup, ante*, page 522. On the authority of that case, it is ordered that the appeal herein be dismissed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*dissenting*). I dissent on the grounds fully set forth in *State v. Northrup, ante*, page 522.

**STATE EX REL. NORTHRUP, RELATOR, v. CONROW
RESPONDENT.**

[Argued November 16, 1893. Decided December 23, 1893.]

CRIMINAL LAW—Right of accused to speedy trial.—Where a defendant has been twice tried before the expiration of the second term after the filing of the information, and the state prosecutes an appeal from an order granting him a new trial after a conviction on the second trial, which appeal was finally held to be unauthorized, and during the pendency of such appeal two terms elapsed without another trial, this is not a denial to the accused of the speedy trial guaranteed him by the constitution (Art. III, § 16), nor does it entitle him to be discharged by virtue of section 303 of the Criminal Practice Act, requiring one indicted for an offense and committed to prison to be brought to trial before the end of the second term of the court, having jurisdiction of the offense, which shall be held after the indictment is found. HARWOOD, J., dissenting.

Appeal from Sixth Judicial District, Park County.

Relator's application for a writ of *habeas corpus* was denied by HENRY, J. Affirmed.

Statement of the case by Mr. Justice DE WITT.

Relator in this case is the same person who is respondent in the case of *State v. Northrup, ante*, page 522. See that case for the general facts. Relator was arraigned November 14, 1892, upon an information charging murder. On November 23d he was tried, and the jury disagreed. Relator was then remanded to the custody of the sheriff, respondent herein. On January 23, 1893, he was tried the second time, and convicted of murder in the second degree. On March 24, 1893, the district court granted a motion for a new trial. Since that time he has been in the custody of the sheriff, and there have been

two terms of court—one from April 10 to April 22, 1893, and the other from June 19th to October 23d. At each term a trial jury was in attendance. There was time at each term to try relator. The state did not apply for a trial at either term. The defendant's attorneys asked to have the case set for trial. It does not appear whether this request was made at the April term or the June term, or whether it was made when the jury was in attendance, or after it was discharged. The state's attorney asserts in his brief that "the appellant made no demand whatever for a trial at the April term, nor even at the June term, until several weeks after he knew the jury had been discharged." This does not appear affirmatively in the record, nor does it appear that there was any jury in attendance when the request was made. The state, meantime, had taken, on March 29, 1893, the appeal from the order granting defendant's motion for a new trial, which appeal was considered in *State v. Northrup*, above referred to. At the close of the June term of the district court, on October 23, 1893, relator, showing the above facts, asked his discharge in that court upon *habeas corpus*, relying upon section 303 of the Criminal Practice Act. The court remanded him, and, from that judgment, relator now appeals.

Campbell & Stark, for Relator.

Henri J. Haskell, attorney general, *H. J. Miller*, and *Allan R. Joy*, for Respondent.

DE WITT, J.—The constitution of this state provides, in article III, section 16, that in all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. The statute, Criminal Practice Act, section 303, is as follows:

"SEC. 303. If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the indictment is found, he shall be entitled to be discharged, so far as it relates to the offense for which he was committed, unless the delay shall be

granted on the application of the prisoner, or shall be occasioned by want of time to try the cause at such second term."

The statute thus declares, in effect, that if a defendant committed to prison be not tried before the end of the second term after his indictment (or information filed), unless he himself, or the want of time, has caused the delay, this is not giving him a speedy trial. But the relator in this case does not bring himself within the provisions of section 303. It is not the fact that he was not brought to trial before the end of the second term held after the information was filed. On the contrary, he was tried twice within the period defined by section 303, and within sixty days. It is true that two terms of court elapsed without trying him, after he was granted a new trial, on March 24th. If he could show that the state unreasonably, and without cause, delayed trying him for two terms of court, after he had once been tried, we are of opinion that he might urge such delay as a denial of a speedy trial, without relying upon the statute (§ 303), and depending simply upon the provisions of the constitution (article III, § 16); for the statute (§ 303) does not attempt to, even if it could, provide what shall alone be a denial of a speedy trial. We may therefore inquire whether the facts shown constitute a denial of a speedy trial.

In the case of *United States v. Fox*, 3 Mont. 512, in this court under the territorial organization, the decision was not made in view of section 303, Criminal Practice Act, but was rather upon the general principles of the guaranty of a speedy trial by the constitution of the United States. (Article VI of the amendments.) In that case the United States was the prosecutor. It neglected, for a whole term of court, its duty to provide funds to try the case. The providing of such funds was wholly within the power and the duty of the United States, and it wholly neglected to so provide them, and did not attempt to offer any excuse for the neglect. The court discharged the relator in that case by reason of the neglect to prosecute. But in the case at bar the state has pursued the relator, not without diligence. It tried him twice in rapid succession. It resisted his motion for a new trial. Upon that motion being granted, the state took an appeal to this

court, and, during the pendency of the appeal in this court, the state did not try the defendant again. Pending that appeal defendant sought to be discharged by writ of *habeas corpus* in the district court, and, being remanded, he is now here on appeal from that judgment.

This court has now determined that the appeal of the state in the case of *State v. Northrup*, *ante*, p. 522, was not permitted by law. Relator's argument now is that, as it was decided that the state had no appeal in the case of *State v. Northrup*, *ante*, p. 522, the state is now in the same position as if it had not attempted to appeal, and had simply willfully neglected to try relator during the time when the pretended appeal was pending. We cannot concur in that proposition. Whether or not an appeal would lie to this court from an order granting defendant a new trial seems to have been a question of great difficulty. See the opinions in *State v. Northrup*. The question had never been decided in this jurisdiction. Upon the hearing the contest was most vigorous and earnest on both sides, and the difficulties were such that, after mature deliberation, this court was not able to announce a unanimous decision. Under these circumstances the omission by the state to try the relator a third time, pending their attempted appeal to this court, was not a willful or unreasonable neglect to prosecute. When we observe the difficulty which the question of the appeal caused this court, we may conclude that the legal advisers of the prosecution in the district court did not unreasonably delay the trial of the relator when they ventured to entertain the opinion that they were entitled to the appeal which they attempted to prosecute in *State v. Northrup*. The judgment of the district court remanding relator is affirmed.

PEMBERTON, C. J., concurs.

HARWOOD, J.—I dissent from the views expressed in the foregoing opinion, but concur in the conclusion, on entirely different grounds.

According to the law of this case, as decided in the dismissal of the appeal on behalf of the state, by the order just made in *State v. Northrup*, defendant ought to be discharged from custody, as provided by the statute (Criminal Practice Act, section

303), which statute is entirely consonant with the provisions of the constitution. (Art. III, § 16.) Because, as conceded, two full terms of court passed while defendant was held in jail, under indictment, and was not brought to trial, nor was such failure occasioned by his application for delay. The former trial and conviction had been set aside and annulled by order of the trial court, and defendant held for another trial; and, during the period mentioned, the state was attempting to prosecute an appeal which this court has decided (erroneously, as I believe) was not sanctioned by law. The constitution provides that "in all criminal prosecutions the accused shall have the right to a speedy public trial." And the statute gives large indulgence to the state in providing "if any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense" he shall be entitled to discharge, unless the delay is granted on his application. After the former trial conviction was swept away by order of the trial court, and defendant was remanded to jail, with the indictment resting upon him in force, as this court has held; and from that date, March 24th, to the present December, the prisoner has been held in confinement, with no movement on the part of the state toward bringing him to trial on the indictment. During this time, as conceded, at least two terms of the court "having jurisdiction of the offense," and fully equipped to try said cause, have convened, progressed through the term, and adjourned; and all this period of time has been frittered away in a fruitless and illegal attempt to prosecute an appeal, which the law, according to the ruling of this court, did not permit on behalf of the state. I think counsel for the prisoner are right in reasoning that if this court held the attempted appeal was without authority of law, then the prisoner was entitled, under the statute and constitution, to discharge. Counsel for the prisoner did not find in those constitutional and statutory enactments the idea, "in effect," as the foregoing opinion put it, that if the prisoner has been tried once within the time provided by law, and the results of that proceeding be entirely annulled, then the prisoner may be kept in jail, an indefinite length of time, with the indictment hanging over

him, without trial, and the statute referred to has no effect. But such appears to be the interpretation placed upon the provision by the majority of this court, in saying the prisoner "does not bring himself within the provision of section 303, it is not the fact that he was not brought to trial before the end of the second term held after the information was filed."

The opinion of the majority of this court, read in connection with their opinion in dismissing the state's appeal in the same case, concedes that the state, without any legal ground so to do, have held the prisoner in jail more than two full terms of the trial court, without bringing him to trial; and, according to the interpretation and application of section 303, as found in the foregoing opinion, the prisoner can now be kept in jail as many terms as the state, through delinquency, without any legal ground therefor, may be disposed to delay the trial. This interpretation is based upon the assumption that said section provides "in effect" that if the prisoner is brought to trial before the end of the second term after the indictment is filed against him, and that proceeding is annulled, then the prisoner may be held in jail, without trial, as long as the state may see fit, without any legal ground to support said action, and the prisoner cannot claim the protection of the constitution and statute against such wrongful delay. I do not concur in that interpretation of the statute, nor do I find in the statute or the constitution any implication or proviso that the same shall have no effect in case the state delays the trial, by undertaking in a fruitless and illegal method to test some question of law; even if "the contest was vigorous and earnest" in respect thereto. Nor should there be read into that statute a proviso that it shall not have effect if the state "did not unreasonably delay the trial" of the prisoner, as seems to be interpolated into it in the foregoing opinion. Neither the statute nor constitution has made any such proviso. The statute fixes the delay which shall give the prisoner the right to claim discharge, without inquiring whether there was a plausible, reasonable, or unreasonable excuse for the delay. The statute declares all the grounds upon which the discharge may be demanded, and in this case it is practically conceded that all those grounds exist in favor of the prisoner. But practically there is read into that statute by the foregoing opinion a proviso which

it does not contain, to the effect that if the prosecutor conceives that he has a question of law to test on appeal, and suffers the prisoner to lie in jail under indictment three quarters of a year, in an attempt to take an appeal which the law does not permit, then the prisoner shall suffer without benefit of the guarantee of the constitution and statute.

The only ground upon which I can concur in the result of this decision is, that the state was authorized to prosecute the appeal, which it did prosecute, upon the ruling of the trial court on the questions of law, whereby the conviction was annulled and a new trial ordered. If that appeal was authorized by the statute the order of the court granting a new trial solely on two questions of law did not take effect, if an appeal was taken, until after review by the appellate court, and the prisoner's application for new trial was held in abeyance until the appellate court passed thereon. Nor was the conviction annulled until the appellate court passed upon the appeal, if the appeal was authorized.

From that point of view the prisoner was not wrongfully held in jail, but was held there as the legal effect and result of his own application, because he was not entitled to a new trial until the authority therefor had been fully adjudicated. I have no doubt the order of the learned trial court, in overruling the prisoner's application for discharge, under this writ of *habeas corpus*, was made on the theory that the state was entitled to appeal, and have reviewed the questions of law upon which the order for new trial was granted. From that point of view the ruling of the trial court was correct. When the trial court ruled upon this application for discharge this court had not determined that such appeal was illegal, and should be therefore dismissed. But when it was found by this court that the state had no authority to attempt such an appeal, it virtually follows as the law of the case, that the state had no authority, under the constitution and statute mentioned, to delay the trial of the prisoner, as has been done. The views of the majority of the court upon the motion to dismiss are contrary, however, to those I entertain, and, according to the views I entertain in that case, the prisoner would have no right to discharge under this proceeding. On that ground alone I can concur in the determination announced in this case.

**MONTANA CATHOLIC MISSIONS, S. J., APPELLANT,
v. THE COUNTY OF LEWIS AND CLARKE ET
AL., RESPONDENTS.**13 559
21 598

[Argued March 14, 1893. Decided December 29, 1893.]

TAXATION—Institutions of public charity—Exemption.—The intention of an institution of purely public charity, to use certain of its lands for the purpose of erecting buildings for charitable purposes, is not sufficient to exempt such lands from taxation under the constitution (Art. XII, § 2) and the revenue act (Laws, 1891, § 2,) exempting from taxation such property as is used exclusively for institutions of purely public charity.

SAME—Same—Constitutional and statutory construction.—Section 2 of article XII of the constitution, and section 2 of the revenue act of 1891, enacted pursuant thereto, exempting from taxation certain property, "and such other property as is used exclusively" for certain societies, "for educational purposes, places of religious worship, hospitals, . . . and institutions of purely public charity," do not exempt a charitable institution as an association or corporate body, from the payment of taxes, but only such property of the institution as is used exclusively for charitable purposes.

Appeal from First Judicial District, Lewis and Clarke County.

Action to enjoin collection of taxes. Judgment was rendered for the defendants below by HUNT, J. Affirmed.

Statement of the case by the justice delivering the opinion: This action was brought by the plaintiff against the county of Lewis and Clarke, and the treasurer thereof, praying for a judgment that the assessment of general taxes against certain real estate of plaintiff, and the levy of said taxes, be adjudged to be void, and that the said treasurer be enjoined from selling said property for said taxes.

The plaintiff set up in its complaint that it was an institution of purely public charity, and that it was the owner of certain lands in Lewis and Clarke county, describing them. It is not set up in the complaint that this land is now being used by the plaintiff in any manner. It is alleged in the complaint that the lands are held for the purpose of erecting buildings for certain purely charitable purposes, unsectarian in character. Upon these lands the general taxes were assessed and levied by the county of Lewis and Clarke for the year 1892.

The plaintiff claimed before the board of equalization that it was exempt from this taxation, but the board refused to

allow said claim, except as to twenty acres of the tract, above described, upon which is being built an asylum for orphans.

A general demurrer to the complaint was sustained, and judgment thereon entered for defendants. The plaintiff appealed. The appeal brings up for a construction the following provisions of the constitution and laws: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals, and places of burial, not used or held for private or corporate profit, and institutions of purely public charity, may be exempt from taxation." (Const., art. XII, § 2.)

In pursuance to this provision of the constitution the legislature enacted as follows: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, and such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, are exempt from taxation; provided, no more land than is necessary for said purposes shall be exempt." (Act Concerning Revenue, § 2, p. 73, 2d sess., 1891.)

T. J. Walsh, for Appellant.

The plaintiff claims that the word "institution" in the statute and in the constitution is used in its largest and most comprehensive sense to signify, as expressed by Webster, "An established or organized society or corporation as a literary institution, a charitable institution," as well as in the sense of "a building or the buildings used by such organization, as the Smithsonian Institution." (*Nobles Co. v. Hamline University*, 46 Minn. 316.) If the larger primary meaning is given to the word, then the property of plaintiff is exempt from taxation; if the more restricted derivative and recent use alone is to be ascribed to it, then the property is taxable, for no claim of exemption is made for it except under the clause re-

ferred to. The question is presented in substantially the same light as would be the constitutionality of an act which read that all property of any corporation organized under the laws of this state for purposes of purely public charity shall be exempt from taxation—the property claimed to be exempt being something besides a building. What is the rule governing the court in the determination of such a question? It is that any "reasonable doubt must be solved in favor of the legislative action, and the act be sustained." (Cooley on Constitutional Limitations, 87, 182; Sedgwick on Statutory and Constitutional Construction, 409.) "A constitution is intended for the benefit of the people, and must receive a liberal construction." (Endlich on Interpretation of Statutes, 526.) This expression, "institutions of purely public charity," is found in similar provisions of the constitutions of Ohio and Pennsylvania, and in both of these states has been construed to refer to the corporation or association, and not alone to the building occupied by such. (*Gerke v. Purcell*, 25 Ohio St. 229-44; *Donoghue's Appeal*, 86 Pa. St. 306.) The plaintiff's construction is within the plain purport of the words used, and it violates no canons of grammar or rhetoric; but the defendant makes the framers of the constitution guilty of the grossest tautology. Hospitals not used or held for private or corporate profit are institutions of purely public charity (*Gerke v. Purcell*, 25 Ohio St. 229), using the word "institution" in the sense of a building. If the word was to be used in that sense in the constitution, the clause should have read, "and other institutions," etc. The use of the word in the sense contended for by plaintiff in similar statutes is common and much more frequent than in the restricted sense. Besides in the states before referred to, it is so used in the Iowa statutes. (McLain's Statutes, 1277.) In California, as will be seen by *San Francisco etc. Soc. v. Story*, 32 Cal. 65. In Massachusetts there is exempt "the personal property of literary, benevolent, charitable, and scientific institutions incorporated within this commonwealth, and the real estate belonging to such institutions occupied by them or their officers for the purpose for which they were incorporated." (Pub. Stats., c. 2, § 5, cl. 3.) If the contention of defendants is correct, the beneficent provisions

of the first part of the foregoing statute are beyond the reach of the legislature of Montana. (See, also, *Massachusetts Soc. v. Boston*, 142 Mass. 24.) So in Illinois, "all property of institutions of purely public charity when actually used for charitable purposes, not leased or otherwise used with a view to profit," is exempt. (Starr and Curtis' Annotated Statutes, 2027.) In fact, the use of the word in these statutes in the sense of a building or establishment seems to be comparatively rare. If the institution is devoted to charity by the very fundamental law of its existence, and is free from the elements of private or corporate profit, it is an institution of purely public charity, and the fact that tuition fees may be required to make up part of the expense of maintaining the college or school does not deprive it of that character. (*Philadelphia v. Women's Christian Assn.*, 125 Pa. St. 572; *Humphries v. Little Sisters of the Poor*, 29 Ohio. St. 201; *Hennepin County v. Brotherhood of Gethsemane Church*, 27 Minn. 460, 38 Am. Rep. 298.) The plaintiff has devoted the one tract to the purpose of a college or university, the other for a school. It proposes to erect and equip these establishments. This is a charity. These institutions of learning will be at the service of the public generally. That makes them public charities. There is no intention to make either private or corporate profit out of them. That makes them purely public charities. And these enterprises characterize the work for which the plaintiff exists and was incorporated.

Henri J. Haskell, attorney general, and C. B. Nolan, for Respondent.

By the constitution of Montana certain classes of property are absolutely exempt from taxation, and other enumerated classes may be exempt at the option of the legislature. The constitutional provision regarding taxation has reference to property, as is seen by the language used, and when the tax-gatherer proceeds in his official mission, he taxes, or refrains from taxing, property, and not corporate entities.

The intent of the legislature in the exercise of this taxing power under the constitution is made manifest in the portion of the revenue act applicable, and in view of appellant's con-

tention, the following language is suggestive "provided, no more land than is necessary for said purposes shall be exempt." In this instance it cannot be contended that the land in question is used exclusively for the purposes for which the society was incorporated, for the admission is made that it is not used at all; there is simply an expressed intention to erect establishments thereon in the near future; but it is the use, and not the ownership, that would entitle it to exemption. The intention to exempt property from taxation must be expressed in clear, unambiguous terms; taxation is the rule, and exemption is the exception. (Cooley on Taxation, 146, and authorities cited in note 1; Desty on Taxation, 110, 118.)

Exempting clauses similar to ours are incorporated in nearly all the state constitutions, and the courts invariably hold that some actual appropriation of the land for the purposes intended must be shown in order to exempt it from taxation, and the intent to so appropriate it at some indefinite time in the future is not sufficient. (*Ramsey Co. v. Church of Good Shepherd*, 45 Minn. 229; *Green Bay etc. Canal Co. v. Outagamie County*, 76 Wis. 587; *People v. O'Brien*, 53 Hun, 580; *Mullen v. Commissioners*, 85 Pa. St. 288; 27 Am. Rep. 650; *Detroit Young Men's Society v. Mayor*, 3 Mich. 172; *Mulroy v. Churchman*, 60 Iowa, 717; *Northwestern University v. People*, 80 Ill. 333; 22 Am. Rep. 187; *The Vermont*, 6 Ben. 115; *Redemptorist Fathers v. Boston*, 129 Mass. 178; *Morris v. Lone Star Chapter*, 68 Tex. 698; *Trustees v. Bohler*, 80 Ga. 159; *Washburn College v. Commissioners*, 8 Kan. 344.)

DE WITT, J.—The contention of appellant is, that section 2 of article XII of the constitution and section 2 of the revenue act of 1891 exempt from taxation the real estate described in its complaint. It is fully conceded by the complaint that the real estate is not used by the plaintiff exclusively, or at all, for an institution of purely public charity. It is alleged that it is intended to be so used. For the purposes of this decision it may be considered that the plaintiff is an institution of purely public charity.

It is observed that the section of the constitution cited describes two classes of property. We will notice the distinc-

tion as to these two classes: 1. It names the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries. It is not left to the legislature to say whether or not the property of these institutions shall be exempt. The constitution, in itself, settles that it shall be. Nor is the test of exclusive use mentioned. The constitution says, simply, "the property" of these institutions shall be exempt.

Then the section of the constitution advances to another class of property, and describes it as "property as may be used exclusively for" certain purposes, and defines the purposes, and among them names "institutions of purely public charity." This class of property is not exempt from taxation, under the constitution, but may be made so by the legislature. The legislature has acted. (Revenue Act, 1891, § 2.) It has therein declared to be exempt property as is used exclusively for the purposes mentioned in the section of the constitution, *supra*, and redescribes those purposes in the exact language of the constitution, making only the appropriate changes in the mood of the verbs. So, with the constitution and the law together, we have this condition: Property of certain entities, as the state, cities, etc., is exempt; and property exclusively used for certain purposes is exempt. The property in question falls within the second class, as the plaintiff is not one of the institutions mentioned in the first class, as the state or a city, etc., but is an "institution of purely public charity." And, we find from the complaint, that the property is not used exclusively, or at all, by such "institution of purely public charity." The most that the complaint alleges is that the property is intended to be so used. Such intention is not sufficient to constitute the use contemplated by the constitution and the law. (*Green Bay etc. Co. v. Outagamie County*, 76 Wis. 587.)

In Pennsylvania the court went further than we do, or need to, and held that the exemption would not apply to premises on which a church was in process of erection. (*Mullen v. Commissioners*, 85 Pa. St. 288; 27 Am. Rep. 650.) How much stronger against the appellant is the fact, that in its case, there is not even a commencement of the alleged intended use.

(See, also, *Detroit Y. M. Soc. v. Mayor*, 3 Mich. 172; *Mulroy v. Churchman*, 60 Iowa, 717; *Redemptorist Fathers v. Boston*, 129 Mass. 178; *Washburn College v. Commissioners*, 8 Kan. 344.)

We are therefore clearly of the opinion that, as the property in question is not at all used for an "institution of purely public charity," it is not exempt from taxation.

This must be held unless a construction of the constitution, and the law, which appellant urges, and which we will now examine, is to be adopted. It contends that the language does not mean that *the property* used by such institution shall be exempt, but rather that the institution as such as an association or corporation shall be exempt from paying taxes on its property. The conclusion would be that such institution is exempt from paying taxes upon any of its property. Appellant contends that the word "institution," used in the statute, means the association, the corporation or the concern, whatever it may be. Concede that such is the meaning. Still we are of opinion that the section is describing property that is, or may be, exempt, and not the institution which is the owner of property.

The whole sense of the section is, that it describes property; the property of the United States; the property of the state, of cities, etc.; property used exclusively for—, for what? For the following purposes, then setting forth the purposes. The word "for" is not repeated before each described purpose, nor does grammatical construction or perspicuity require it. Its sense is carried over to each mentioned purpose. The intention is just as clear that the section means "*used exclusively for institutions of purely public charity*," as it is that it means "*used exclusively for agricultural societies*." We adhere to the view that the language intends to describe the property used, and not the concern using it, as being exempt. This view is in accord with the grammatical construction of the language, with the context of the section, and the general intent expressed therein.

To adopt appellant's construction would be to hold that if an institution were simply of the character described in the constitution and law, that, as far as the revenue laws are concerned, it might hold exempt from taxation all property of

any character, and of any amount in value, whether it used such property exclusively, or at all, for purely public charity.

Against this view are the decided cases *supra*, reason, the context of section 2 of article XII, and the spirit of the constitution on the subject of taxation. That instrument provides: "All property shall be assessed in the manner prescribed by law, except as otherwise provided in this constitution." (Art. XII, § 16.) So appellant seeks to bring itself within an exception to the constitutional rule that "all property shall be assessed."

Upon this subject Mr. Justice Brewer, as a member of the supreme court of Kansas, appropriately remarked: "All property receives protection from the state. Every man is secured in the enjoyments of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is coextensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless, it is an exception; and they who claim under an exception must show themselves within its terms." (*Washburn College v. Commissioners*, 8 Kan. 344.)

Appellant herein seeks to bring itself within the exception by a strained and unnatural construction of the constitution, as above shown. The district court held against it, in which that court was correct. Its judgment is therefore affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (*concurring*).—I concur in the foregoing conclusion on the ground that the legislature, in exercising the power delegated to it by the constitution of providing, among other things, exemption from taxation of property "used exclusively" for "institutions of purely public charity,"

has especially provided, as to *exemption of land*, that "no more land than is necessary for said purpose shall be exempt." The contention involved in this case relates entirely to the question of exempting land, and it seems clear to me, under the provisions of the law, that land, although held by such institutions, but not in use for the purposes of such charity, cannot claim exemption from taxation. It will be noticed that the legislature made the clause above quoted relate specifically to *land*, and the observations in the treatment of this case must be confined to the question of exemption of that character of property; and broader implications, as governing the construction of the provisions respecting other classes of property, should not be indulged to determine future cases involving the question of exemption of other classes of property held by such institutions, dedicated irrevocably to the use upon which the exemption is declared, although not actually converted into active use at the moment it was sought to be taxed.



RULES OF THE SUPREME COURT OF THE STATE OF MONTANA.

REVISED AND ADOPTED AT THE COMMENCEMENT OF THE
MARCH TERM, 1894.

I. RECORD OF OFFICIAL COMMISSION OF COURT OFFICERS.

The official commission and oath of the justices and clerk of this court, and the state's attorney general, shall be recorded in the record of this court.

II. RECORD ON APPEAL.

Appellant is charged with the duty of having the transcript perfected, and filed with the clerk of the supreme court, in accordance with the statute and these rules. Therefore:

1. TIME FOR FILING RECORD.

(a) *In Criminal Cases*, the record on appeal, comprising the proper matter, prepared and authenticated in such manner as prescribed by statute and these rules, shall be filed by appellant with the clerk of this court within thirty days after such appeal is perfected (Crim. Prac. Act, § 397), or the same is subject to dismissal.

(b) *In Civil Cases*, the record on appeal, comprising the proper matter, prepared and authenticated in such manner as prescribed by the Code of Civil Procedure and these rules, shall be filed by appellant with the clerk of this court within sixty days after such appeal is perfected, and the bill of exceptions, or statement, if any, to be used therein, is settled, otherwise the appeal is subject to dismissal. But—

2. TIME EXTENDED IF DELAY IS WITHOUT APPELLANT'S LACHES.

If it appear that appellant filed his *præcipe* with the clerk of the trial court in reasonable time, directing the preparation of the transcript, specifying the proper matter to be included therein, and the same was not prepared in time for filing in the appellate court, as required by these rules; and such delay has been without laches on the part of appellant, his appeal will not be dismissed for such delay until reasonable time is allowed for filing the record.

3. DISMISSAL FOR LACHES.

But if it appear that the *præcipe* requiring the preparation of the transcript was not filed in time to allow the clerk of the trial court reasonable opportunity to prepare the same for filing in this court, according to the requirement of these rules; or if material and necessary parts of the record are not called for by the *præcipe*, and no satisfactory excuse for such omission appears, the appeal may, in the discretion of the court, be dismissed for such delinquency.

4. MOTION TO DISMISS FOR LACHES.

Motion to dismiss an appeal, for failure to file the record within the time required, shall be accompanied by a certified copy of the notice of appeal, and *præcipe*, if one were filed; and a certificate of the clerk of the trial court, showing whether the case was originally instituted in the district court, or was there on appeal from an inferior court, and the nature, amount, and date of judgment or order appealed from; the date of filing notice and undertaking on appeal; the date of service of such notice, and showing whether appellant has requested or received a duly certified transcript, and the time of such request, or delivery thereof, as the case may be.

5. SUGGESTION OF DIMINUTION.

Nor shall the appeal be dismissed because the transcript is imperfect, not being prepared as directed by the *præcipe*; but this court will, on suggestion of diminution, order the clerk of the trial court to correct the transcript, or supply the portions lacking, as the case may require.

(a) Same. Respondent may likewise make suggestion of diminution of record in any respect he may deem necessary; whereupon, if the suggestion appears to be proper, an order will be made requiring such parts of the record suggested to be certified to this court.

6. CORRECTION OF ERROR IN RECORD.

Either party may, in writing, suggest error or defect, wherein the transcript does not conform to the original, and, upon notice to the adverse party, obtain an order of this court requiring the clerk of the trial court having in custody the original record, to either compare and correct the transcript on file in this court, or certify a supplemental transcript of such parts of the record as may be thus questioned. If such error or defect be disputed by the adverse party the suggestion must be verified in the manner required by law for verification of pleadings.

III. MANNER OF PREPARING RECORD.**1. HOW PRINTED AND BOUND.**

The record on appeal containing such matter, properly authenticated, as provided by the Code of Civil Procedure, shall be printed or typewritten, on paper of such uniform size and quality, and having such margin, and bound in such manner, as will be designated by the clerk of this court on application.

2. ARRANGEMENT AND INDEX.

The component parts of the record on appeal shall be chronologically arranged, and contain an index, showing the page of each pleading, document, exhibit, order and proceeding, and the testimony or affidavit of each witness comprised therein.

3. TESTIMONY TO BE IN NARRATIVE FORM.

The evidence to be used on appeal, whether testimony of witness examined on the trial or depositions, shall be reduced to narrative form.

4. IDENTIFICATION OF MATTER REFERRED TO IN EXCEPTIONS OR MOTIONS.

Where an exception refers to matter in pleadings evidenced, or other proceedings, which the court struck out, or refused to strike out, on motion, such exception or motion must either recite the matter in question or be made to refer to the same matter by page and line, as it appears in the transcript, otherwise such exception may not intelligibly identify the matter in question in the transcript.

5. FORMAL PARTS OF PAPERS OMITTED.

Unless some question is predicated upon the formal parts of pleadings, motions, depositions, exhibits or other papers filed in the trial court, and made part of the record on appeal, the same should be omitted in preparing the record, after once stating the venue and title, giving the names of parties in full, and thereafter the venue and title may be indicated by the words "title of cause." And likewise—

(a) Formal parts of depositions, i. e., notices, interrogatories, certificates of officers taking the same, signatures of witnesses, etc., may be omitted, the substance of the testimony contained in the depositions being reduced to narrative form, subject to amendment and settlement by the trial judge, as in the case of other testimony.

(b) So with deeds, mortgages, contracts, and other exhibits, the endorsement thereon of certificates of acknowledgment and recording may be omitted, and only the material part stated.

(c) All endorsements made by officers may be omitted in preparing the record, except the date of the filing of papers in the trial court, which ought to appear in the record by simply noting "filed _____," giving the date of filing.

6. INCORPORATION OF AN ORIGINAL EXHIBIT IN THE RECORD.

Whenever in the trial of an action or other proceeding finally appealed to this court, an exhibit of a printed book or

pamphlet, or other printed or engraved matter, or of a model, drawing, map, trademark, plans or illustrations, or other matter formed, drawn, printed or engraved, is introduced or offered in evidence, and it is desired by either party to use the same original exhibit as part of a statement on motion for new trial, or of the case on appeal, or in a bill of exceptions, such exhibit, authenticated by a certificate of the judge of the trial court thereon or attached thereto may be brought to this court in its original form as introduced in evidence, either bound in the transcript of the record on appeal, if convenient so to do, or as an exhibit accompanying such record to this court properly authenticated and certified. Any such exhibit bound in the record filed in this court shall not be withdrawn; but any such exhibit not bound in the record may be withdrawn after determination of the case by order of the court or any justice thereof.

Whenever the record contains a transcript of any document, writing, map, drawing, engraving, or printed matter, which was introduced in evidence in a case brought to this court on appeal, and it is deemed expedient to have the same here for examination in the original form, an order will be made requiring the officer or party having the same in custody to place such original exhibit in the custody of the clerk of this court. Any such exhibit may be withdrawn by the party entitled to the custody thereof after determination of the appeal, by application to the clerk of this court.

7. PROOF OF EXCEPTION WHERE TRIAL COURT REFUSED TO ALLOW THE SAME.

In case any judge of the district court fail or refuse, upon proper presentation or request, to allow, settle, and certify an exception or statement of the case in accordance with the facts and the law and practice in such cases, the party aggrieved may, within twenty days thereafter, present to this court, or any two justices thereof, a petition verified by the oath of the party aggrieved or his attorney, setting forth the facts in relation to such failure or refusal; and thereupon this court, or such justices thereof, will, if sufficient grounds appear therefor, issue an order granting leave to the petitioner to prove be-

fore a referee to be named in such order, or by depositions to be taken in the manner prescribed by statute, the facts in relation to such exception, or bill of exceptions, or statement of the case, and the failure or refusal to allow, certify, or settle the same.

A copy of such order shall be served on the adverse party to the action or proceeding wherein such failure or refusal is alleged to have occurred, or his attorney, together with the notice of the time and place of taking such testimony.

IV. AS TO PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.

1. The record and other papers filed with the clerk of this court may be examined in the clerk's office and in the court-room upon the hearing, but shall not be taken therefrom except by counsel on permission of the clerk, leaving a receipt with the clerk therefor; and when so taken shall not be retained out of the clerk's office more than ten days in any case, and shall be returned within a shorter period upon notice.

2. If permission to counsel to remove a paper or record is refused, application may be made to the court or any justice.

V. PROCEDURE IN CASE OF DEATH, DISABILITY, OR TRANSFER OF INTEREST.

In event of the death, disability, or transfer of interest of a party to an appeal pending in this court such fact shall be in writing suggested, and (unless the cause of action abate) the legal representative of the party deceased or disabled, or successor to the party transferring his interest, shall, on motion, be substituted, whereupon the adjudication will proceed.

VI. BRIEFS.

1. TIME OF FILING AND SERVICE.

Seven copies of each brief printed, and bound in pamphlet form, shall be filed with the clerk for the use of the court and its officers. Appellant's brief shall be filed and a copy thereof served on respondent's counsel within ten days after filing the record on appeal, and within ten days after such service re-

spondent shall file his briefs, and serve a copy thereof on appellant.

2. REFERENCE TO RECORD.

References in the brief to matters in the transcript shall indicate the page referred to.

VII. SUBMISSION OF CASES ON APPEAL.

1. SETTING CASES FOR ARGUMENT.

This court will, on its own motion, set appeal cases for argument, as reached for determination in their chronological order, as filed, except criminal cases, and those of like nature, which shall be given precedence; and counsel or parties will be given ample notice of such setting of the case for argument.

2. STIPULATION FIXING TIME FOR ARGUMENT.

This court will accommodate, as far as practicable, stipulations fixing time for argument, however, preserving the privilege of the parties to submit appeals for determination in chronological order, according to the date of filing.

3. SUBMISSION BY FAILURE TO APPEAR AT TIME SET FOR ARGUMENT.

If either party fail to appear at the time set for argument, the case will be deemed submitted on his behalf, without argument. Or—

4. SUBMISSION ON BRIEFS BY STIPULATION.

Cases on appeal may be submitted on briefs at any time by filing stipulation of counsel to that effect; which case will then be considered and determined, as reached in chronological order. However, no implication of discouragement to well-directed argument, expounding the facts and law relied upon, should be drawn from this provision.

VIII. SUBMISSION OF ORIGINAL PROCEEDINGS IN THIS COURT.

Proceedings originally commenced in this court, such as *habeas corpus*, *certiorari*, *mandamus*, and the like, will be determined immediately upon submission, without reference to the rules governing the submission of cases on appeal.

IX. MOTIONS FOR REHEARING.

Motions for rehearing, stating the grounds, points and authorities relied on, shall be filed within fifteen days after the determination of the appeal. If prior to filing such motion remittitur has been issued, the same may be recalled by the court or any justice thereof. The motion for rehearing will be considered without argument; and, if granted, notice will be given, and such appeal reset for further argument and consideration.

X. SUBMISSION OF MOTIONS.**1. MOTIONS TO BE FILED AND COPY SERVED.**

All motions in this court shall be in writing, stating the grounds thereof, and filed, and copy served on counsel for adverse party, if any counsel has entered an appearance, otherwise on clerk of the court for the party or counsel.

2. MOTIONS GENERALLY DETERMINED WITHOUT ARGUMENT.

As a general rule motions will be considered and disposed of without argument; but citation of authorities may accompany the motion.

3. MOTION AFFECTING THE STATUS OF APPEALS.

Motions to strike out parts of record, or to dismiss appeal, or otherwise affect the standing of the case in the appellate court, shall be stated in typewriting, specifying the ground therefor; accompanied by citation of authorities relied on, and filed; and copy thereof served on adverse party at least ten days before the case is set for hearing on the merits. Thereupon the adverse party may, within ten days after the service thereof, file and serve on the other his brief, citing authorities, and explaining the record, in opposition to the motion. Such motion will then be considered and disposed of by the court without further argument; or reserved for argument and decision when the case is submitted in chronological order for final determination of the appeal.

XI. THE TERM CALENDAR.

The calendar of each term shall consist of all undetermined cases, filed two days prior to the commencement thereof, and

such other cases as may, on motion, be ordered entered upon the calendar of that term.

XII. ADVANCEMENT OF CASE ON CALENDAR.

Any case may be advanced on the calendar for hearing and determination on suggestion showing sufficient reason therefor.

XIII. COSTS ON APPEAL.

1. To WHOM TAXED.

In all cases the costs of appeal shall be taxed against the unsuccessful party, unless otherwise ordered by this court, and the remittitur shall be accompanied by an itemized statement of such costs as are paid to the clerk of this court.

2. To BE PAID BEFORE REMITTITUR ISSUE.

In conformity with the provisions of the statute requiring the clerk of this court to collect fees in advance, and pay the same into the state treasury, the remittitur from this court shall be sent to the trial court, or party applying therefor, only when the application is accompanied with payment of the costs.

XIV. ASSESSMENT OF DAMAGES FOR APPEAL WITHOUT MERIT.

If the court is satisfied from the record, and the presentation of the appeal, that the same was taken without substantial or reasonable ground of error, or cause for relief, but apparently for purposes of delay only, such damage will be assessed, on determination thereof, as from the circumstances is deemed proper, to discourage the taking of appeals solely for unreasonable and vexatious delay.

XV. REMITTITUR, WHEN ISSUED.

Remittitur will, in cases where it is deemed proper, be ordered forthwith on determination of appeal; otherwise the same will be issued on application at any time five days thereafter, unless motion for rehearing or modification of judgment is then pending. If such motion be interposed after remittitur has issued, the same may be recalled by order of this court, or any justice thereof, to await the determination of the motion.

A copy of the opinion will accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings, other than the entry of a final judgment or order determining the proceedings in the trial court.

XVI. MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON.

Upon the receipt by the clerk of this court of a mandate from the supreme court of the United States in any case at law or in equity, theretofore taken from this court by writ of error or appeal to said supreme court, it shall be the duty of said clerk forthwith to issue under his hand and the seal of this court a remittitur to the district court of the district and county in which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in *hæc verba* of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

XVII. ENROLLMENT OF ATTORNEYS.

1. EXAMINATION OF APPLICANTS.

The examination of applicants for admission to practice law in the courts of this state, other than those who present proof of admission in other states, shall be reduced to writing, in the presence of the examining committee, either by stenographic record thereof or by submission of questions and replies in writing, which shall be retained in the custody of the chairman of the committee; and if admission of the applicant is recommended, a typewritten copy of such examination, certified by at least two members of the committee, to the effect that the same is a true record of the examination of such applicant, taken in writing, in their presence, without aid, or opportunity of aid, prompting or counsel, of applicant while said examination proceeded, shall be transmitted to this court with such recommendation of the committee.

2. PROOF OF GOOD CHARACTER.

The recommendation shall be accompanied by satisfactory proof of good moral character.

3. ADMISSION OF ATTORNEYS FROM OTHER STATES.

Application for license to practice law in the courts of this state, based on a certificate of admission to practice law in the courts of another state or territory, or of the United States, shall be accompanied by a petition in writing, verified by oath of the petitioner, showing:

(a) Where, with whom, and the period of time the petitioner studied law, and where he was first admitted to practice; all places in which and the period of time he has practiced as attorney or counselor at law elsewhere than in this state, and especially the place, and period of time, and the courts wherein he last practiced.

(b) Whether or not any proceedings for his disbarment or criminal charges have been instituted or prosecuted against him in any jurisdiction, and if so, a statement of the time, place, circumstances, and result thereof. And,

(c) Such petition must be accompanied by a certificate of the presiding judge of the highest trial court of record in which the petitioner last practiced, attested under the seal of said court, showing that the petitioner was of good reputation and trustworthy in the practice of his profession as attorney and counselor at law in such jurisdiction, which petition and certificate last mentioned shall be filed and preserved in the office of the clerk of this court.

4. OATH.

Before enrollment, every attorney and counselor at law admitted to practice in the courts of this state shall take and subscribe to the oath provided by law for other officers of court.

5. OBJECTIONS TO ADMISSION OF APPLICANTS.

Objection to the admission of an applicant to practice law in the courts of this state may be made by any person by filing with the clerk of this court a statement setting forth the grounds thereof; and thereupon, if such objection is deemed

of sufficient weight, investigation thereof will be made in such manner as the court deems appropriate.

The foregoing revised rules comprise all the rules of the supreme court of Montana in force on this sixth day of March, A. D. 1894. All other rules existing prior hereto are revoked, except in so far as the same affect cases already appealed to this court. Records in cases heretofore appealed may be prepared according to these rules, or according to those heretofore existing.

STATE OF MONTANA. } ss.
}

I, Benjamin Webster, clerk of the supreme court of the state of Montana, hereby certify the foregoing to be a correct copy of the rules adopted to date by said court for the government of its proceedings, and that the same are now in force.

Attest my hand and official seal hereunto affixed the sixth day of March, A. D. 1894.

[SEAL]

BENJAMIN WEBSTER,
Clerk of the Supreme Court of Montana.

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1. The record on appeal from a judgment of nonsuit where proof was introduced by defendant should contain all of plaintiff's evidence, and if the defendant, by the proof which it saw fit to introduce, aided plaintiff or supplied any deficiencies in his proof, plaintiff would be entitled to have such testimony of defendant also made a part of the record.—*McKee v. Montana Union Ry.*, 15.
2. An order granting a motion for a nonsuit, if erroneously made, is an error in law occurring at the trial under section 296 of the Code of Civil Procedure, and is subject to review on motion for a new trial, as well as on direct appeal and a bill of exceptions is available to bring up the record on which the motion for a nonsuit was granted.—*Id.*

3. Under section 5 of the Act of September 14, 1887 (Extra Sess.), the adverse party is entitled to notice of the presentation and settlement of a bill of exceptions prepared from the stenographer's notes after the trial, in order that he may have an opportunity to examine the proposed bill and offer or suggest amendments, and where such notice is not given the testimony contained in such bill of exceptions will upon motion be stricken from the record on appeal.—*Id.*
4. Where a plaintiff elects to stand on his complaint after demurrer sustained it is the duty of the court to render judgment against him for costs so as to place him in a position to appeal; and where the plaintiff is compelled to ask the court to enter such judgment, it is not such a consent to the judgment as to debar him of the right to appeal.—*Stevenson v. Matteson*, 108.
5. A judgment sustaining a demurrer, and dismissing the complaint as to one of several defendants, is a final judgment from which an appeal will lie.—*Id.*
6. Neither sufficiency of the evidence to support a verdict nor objections to instructions will be considered on appeal where the statement on motion for a new trial contains the evidence in the form of a transcript of the stenographer's notes by question and answer, with no attempt to reduce it to narrative form or omit immaterial matter.—*Rodoni v. Lytle*, 128.
7. In reviewing a judgment rendered on motion for a nonsuit, all facts will be considered as proved which the evidence tends to prove. (*Herbert v. King*, 1 Mont. 475; *Gau v. Woolfolk*, 2 Mont. 468, cited.)—*Creek v. McManus*, 152.
8. A judgment will be affirmed where there is nothing before the appellate court but the judgment-roll, upon which no error appears or is suggested, and a bill of exceptions, which is merely a skeleton containing a direction to insert matter therein, which is neither inserted nor in the record by reference.—*Adams v. Bankers' Life Assn.*, 222.
9. When an appeal is taken from the entire judgment and order of the trial court refusing a new trial, a reversal of the judgment and order requires a new trial of all the issues as if the case had never been tried.—*Mattock v. Goughnow*, 300.
10. The ruling of the trial court upon a motion for a new trial will not be disturbed on appeal where the evidence is conflicting and no abuse of judicial discretion appears upon a consideration of the whole record.—*Id.*
11. An appeal from a justice court, after a decision by the justice, brings the case into the district court, with all the original papers, for trial *de novo* on the merits, and therefore alleged errors in the rulings or action of the justice in the adjudication of the case are not reviewable on such appeal. (*State v. Evans*, *ante*, page 239, cited.)—*Missoula Electric Light Company v. Morgan*, 394.
12. Error in the giving or refusal of instructions will not be reviewed on appeal where the instructions are not made a part of the judgment-roll or incorporated in a statement or bill of exceptions.—*Id.*
13. On appeal from justices' courts, both civil and criminal cases are tried in the district court *de novo*, and it is error for the latter court, after rendering judgment in a case so appealed, to grant a motion in arrest of judgment made upon the ground that the justice had no jurisdiction to render the judgment appealed from. (*State v. Evans*, *ante*, page 239; *Missoula Electric Light Co. v. Morgan*, *ante*, page 394, cited.)—*State v. Deslauries*, 398.
14. The filing of a notice and undertaking on appeal stays the proceedings of the trial court upon the judgment or order appealed from, but does not divest the court of power to settle and certify such statements as are required to present matters of law or fact to the appellate court.—*William Mercantile Company v. Fussy*, 401.
15. A motion to strike from the files a supplemental transcript showing amendments to a statement on motion for a new trial, filed upon the granting of a

motion for an order to supply amendments alleged to have been omitted from the original statement, will be denied where there is a dispute as to whether or not such amendments are contained in the original statement, for, if they are, the appellant could not be prejudiced by their duplication, and if not, the respondent is entitled to their benefit.—*Doyle v. Gore*, 471.

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1. In an action to set aside an assignment for the benefit of creditors as fraudulent, both assignors and assignee being made parties defendant, it is not necessary that the complaint should allege knowledge on the part of the assignee of the matters alleged in the complaint to be fraudulent.—*Stevenson v. Mateson*, 108.
2. An assignee, by reason of having possession of the assigned property and goods, and by reason of having a right to defend the assignment, is a proper party defendant to an action to have such assignment declared void.—*Id.*
3. It is the duty of the court upon the filing of a complaint by a creditor to set aside an alleged fraudulent assignment to make such orders in relation to the assigned estate as may be necessary to preserve it for the benefit of rightful creditors, as by the appointment of a receiver, so as to render available any judgment that might be rendered on the final determination of the action.
Id.

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1. An affidavit for attachment setting forth in the language of the statute a fraudulent disposition by defendant of its property as ground for attachment before the maturity of the debt, may be amended on the trial by setting out the facts constituting the alleged fraud.—*Joseph v. Mady Clothing Company*, 195.
2. Where a county board answers to a garnishment that it has money due to a firm of which the defendant in the attachment suit is a member, but that it does not know to which member it may be due, and a suit is afterwards brought by the attachment plaintiff against the board and such defendant, the failure of the board to appear or answer in such suit does not entitle the attachment plaintiff to a judgment against it where it is determined upon the trial that the board when garnished had no funds belonging to its said co-defendant.—*First National Bank of Helena v. Neill*, 877.
3. Defendant in attachment is not entitled to service of the writ and an opportunity to secure the payment of the judgment by giving bond or depositing money prior to a levy upon his property, under section 181 of the Code of Civil Procedure allowing the plaintiff to have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give good and sufficient security to secure the payment of said judgment.—*Hoffman v. Innes*, 428.

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In action for contribution, see CONTRIBUTION, 1.

BAIL AND RECOGNIZANCE.

Forfeiture of bail by justice in misdemeanor, see JUSTICE OF THE PEACE, 3, 4.

Certiorari to review order forfeiting, see CERTIORARI, 3.

BILLS OF EXCEPTION.

Adverse party entitled to notice of settlement after trial, see APPEAL, 3.

BONDS.

Of incorporated city, validity of under act of March 5, 1891, see CONSTITUTIONAL LAW, 1.

Indemnity in attachment, see SURETIES, 1.

BURGLARY.

See CRIMINAL LAW.

CERTIORARI.

To review contempt proceedings, see CONTEMPT, 1.

1. An order for payment of counsel fees and alimony in an action for divorce is an appealable order, and therefore certiorari will not lie to review the action of the lower court in committing defendant for contempt in refusing to obey such order.—*In re Finklestein*, 425.
2. The scope of the writ of certiorari is not so enlarged by section 8, article VIII, of the constitution, providing that "each of the justices of the supreme court may also issue and hear and determine writs of certiorari in proceedings for contempt in the district court," as to permit a review by this court of an order for the payment of alimony, where imprisonment for contempt is involved, notwithstanding relator had a remedy by appeal from such order. (*In re MacKnight*, 11 Mont. 132, 28 Am. St. Rep. 451, cited.)—*Id.*
3. The proceedings of a justice of the peace in declaring the bail of a defendant forfeited may be properly reviewed on certiorari.—*State ex rel. Glenn v. Evans*, 239.

CHANGE OF VENUE.

For prejudice of jurors, see CRIMINAL LAW, 4.

In justice court, see JUSTICE OF THE PEACE, 1, 2.

CHARITABLE INSTITUTIONS.

Exemption of property used exclusively for, see TAXATION, 1, 2.

CHATTEL MORTGAGE.

As constituting separate property list of married woman, see HUSBAND AND WIFE, 1.

Bill of sale as constituting, see SALES, 2.

CLAIM AND DELIVERY.

1. Where both parties in an action of claim and delivery alleged in the answer and replication the existence of an agreement concerning the cutting of grass upon plaintiff's land, and set forth the terms of such agreement without substantial difference, raising an issue only as to whether the defendant cut the

grace within a reasonable time, an objection by plaintiff to the reception of proof as to any agreement whereby defendant claimed the hay, in that such agreement was not in writing, and being for an interest in land, was void under the statute of frauds, was properly overruled, for even if such objection were tenable under pleadings raising an issue thereon, it could not be interposed by plaintiff after admitting the agreement by verified replication.—*Gregg v. Garrett*, 10.

2. In an action to recover possession of horses, wagon, and harness, with damages for wrongful detention, where no special damage is alleged, it is prejudicial error to instruct the jury that the measure of damages is "the reasonable value of the use or hire of the property while in the possession of the defendant from the time of the demand," without also directing the attention of the jury to the consideration of whether the plaintiff could have kept such property constantly employed at a given rate, either by hiring to others, or by employment at home, or whether the gross earnings would have been diminished by expenses of keeping.—*Brunell v. Cook*, 497.

CLERK OF SUPREME COURT.

Must collect docket fee in advance, see *COURTS*, 5.

COLLATERAL ATTACK.

Decisions of secretary of interior not subject to, see *NORTHERN PACIFIC GRANT*, 1.

CONSTITUTIONAL LAW.

Constitutionality of act allowing appeal from Board of Medical Examiners, see *POLITICIANS AND SURGEONS*, 1, 2.

Construction of art. VIII, § 8, see *CERTIORARI*, 2.

Construction of art. XII, § 2, see *TAXATION*, 2.

1. The act of March 5, 1891 (2d Sess. Laws, p. 245), authorizing certain incorporated cities to incur indebtedness for specific purposes by the issuance of bonds to an extent not exceeding four per cent of their assessed valuation, instead of three per cent as limited by the state constitution (§ 6, art. XIII), is not void as being wholly in conflict with said section of the constitution, but is void only to the extent of such repugnancy; and therefore bonds issued by a city under such act are valid where the amount of indebtedness so incurred is less than three per cent of the assessed valuation of such city.—*Dunn v. City of Great Falls*, 58.
2. Where a part of a statute is unconstitutional that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other.—*Id.*
3. Constitutional provisions as well as statutes are construed by the same canons of construction. (*State v. Kenney*, 11 Mont. 553, cited.)—*Id.*

CONTEMPT.

In refusing to obey order for payment of alimony, see *CERTIORARI*, 1, 2.

1. Proceedings to punish for contempt in violating an injunction are reviewable by this court on certiorari. (*In re McCutcheon*, 10 Mont. 115; *In re Shannon*, 11 Mont. 67; *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451, cited.)—*State ex rel. Simard v. Fourth Judicial District Court*, 347.
2. One who has been enjoined from cutting hay upon certain land, and who, after the service of the injunction, advises and procures others to proceed with the cutting and removal of the hay is punishable for contempt.—*Id.*

CONTRACT.

Of sale of promissory note, see NEGOTIABLE INSTRUMENTS, 2.

To deliver deed, see VENDOR AND VENDEE, 1.

To convey lands, see VENDOR AND VENDEE, 2.

Assumption of, sufficiency of pleading, see PLEADING, 6.

Consideration, pleading of, see PLEADING, 9.

CONTRIBUTION.

1. Attorneys' fees stipulated in a mortgage to be paid in case of suit are not recoverable by a mortgagor in an action against his co-mortgagor to enforce contribution and subject the latter's interest in the common property by foreclosure of the mortgage to its proportion of the mortgage debt, where the former, though being obliged to take up the mortgage to avoid foreclosure, had not been compelled to pay such fees.—*Lang v. Cadwell*, 458.
2. One of two mortgagors who, upon being obliged to pay the mortgage debt, takes an assignment of the mortgage to himself is not entitled to a personal judgment against the grantee of his co-mortgagor in an action to enforce contribution and for the foreclosure and sale of the latter's interest, where the conveyance was made subject by express provision to the mortgage. (*Pendleton v. Coo-
ning*, 11 Mont. 88, cited.)—*Id.*
3. The payment by one tenant in common of a lien upon the common property does not extinguish the debt, but entitles him to contribution from his cotenant to the extent of the latter's interest.—*Id.*

CORPORATIONS.

Commercial, right to hold mining property, see MINES AND MINING, 4.

COSTS.

In *habeas corpus* proceeding, see HABEAS CORPUS, 2, 3.

1. An action for damages for injury to land caused by the contamination of a stream, by the mixture of deleterious substances therein which were deposited upon plaintiff's land and destroyed the vegetation, is not an action for trespass, but for creating and maintaining a nuisance, and therefore in such case, where a verdict for one dollar is returned, it is error for the court to tax the costs against the defendant under the act of March 14, 1889 (Laws, 2d Sess., p. 120), allowing costs in actions of trespass without respect to the amount of damages recovered, as the case is controlled by sections 495 and 498 of the Code of Civil Procedure, providing that no costs shall be allowed in an action for the recovery of money or damages when the plaintiff recovers less than fifty dollars.—*Durfee v. Granite Mountain Mining Company*, 181.
2. The fees allowed a county attorney by the act of March 14, 1889, for drawing an information and for the trial of a case are not now taxable against a defendant, such fees being no longer payable either to the county attorney, by reason of that officer's compensation being limited to a salary by the act of March 6, 1891, or to the county treasurer, by reason of county attorneys being omitted from the requirement of the latter act that fees collected by sheriffs and other named officers be paid into the county treasury.—*State v. Middleton*, 368.
3. The action of the trial court in refusing to tax a docket fee upon the granting of a motion to retax costs may be reviewed upon appeal from the judgment.—*First National Bank of Helena v. Neill*, 277.
4. The provision of section 509 of the Code of Civil Procedure, that where the moving party prevails upon a motion to retax costs improperly included in a memorandum of disbursements "there shall be taxed," as a part of the costs of such motion, a docket fee of twenty-five dollars, is mandatory, and the tax-

tion of such fee upon the allowance of a motion is not a matter within the discretion of the court.—*Id.*

6. A tenant in common who has sought no modification of a judgment obtained against him by his cotenant in an action to enforce contribution where such cotenant had paid off a lien upon the joint property, nor offered to reimburse him to the extent of his interest, but has sought to defeat all relief in his favor, both in the trial court and on appeal, will not be allowed costs upon obtaining a modification of the judgment.—*Lang v. Cadwell*, 458.
6. The clerk of the supreme court is not required to file the transcript on an appeal by the state in a criminal case without the payment, in advance, of the docket fee of ten dollars, required by the act of March 6, 1891, to be collected in advance, from an appellant, and the county wherein the prosecution was had is chargeable with the payment thereof.—*State v. Northrup*, 424.

COUNTIES.

Appeal by taxpayer from allowance of claim, see MANDAMUS, 1.

GREDITORS.

Duty of court as to, in action to vacate fraudulent assignment, see ASSIGNMENT, 2.

CRIMINAL LAW.

Costs in criminal case, see COSTS, 2.

1. The bailee of a horse, who converts it with intent to steal, and is tried and convicted under section 98 of the Criminal Laws, providing that if any bailee of property convert the same to his own use with intent to steal, he shall be guilty of grand or petit larceny according to the amount or value of the property converted, can not be punished for grand larceny where the value of the horse as alleged is less than fifty dollars, although section 78 of the Criminal Laws makes the stealing of a horse of whatever value grand larceny. Said statutes being highly penal the rule of strict construction applies, and, in the absence of any qualifying words in section 98 as "nature" or "character" of property, so as to make the offense and punishment the same under both sections, said section 98 is susceptible of no construction under which the defendant could be convicted.—*State v. Hayes*, 118.
2. In a prosecution for uttering a forged instrument which was mailed in one county and received in another, the venue is in the county where the letter containing the forged instrument was received and not in the county where it was mailed.—*State v. Hudson*, 112.
3. The mailing of the instrument is not an act requisite to the consummation of the offense of uttering a forged instrument, there being no uttering in such case until the receipt of the letter, and therefore the above rule is not changed by section 82 of the Criminal Practice Act, providing that when a crime has been committed partly in one county and partly in another, or the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties the jurisdiction is in either.—*Id.*
4. An application for a change of venue in a criminal case, when made upon the ground that a large number of jurors who were examined as to their qualifications stated that they had formed opinions as to the guilt or innocence of the defendant; that such statements made in the presence of jurors who had been accepted tended to prejudice the latter against the defendant, and that the inhabitants of the town where the trial was being held were particularly prejudiced against defendant, and were likely to communicate this prejudice to jurors summoned from the vicinity, is properly denied where such jurors as had been accepted stated, under examination by the court, that they had not

been prejudiced by the statements of the other jurors, and the court offered to excuse from the box jurors who resided in the town.—*State v. Russell*, 164.

5. Dying declarations are admissible in evidence when all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding the declarant may not have said he was without hope of recovery, or was dying, or going to die.—*Id.*
6. Where it appeared that at the time dying declarations were made deceased was mortally wounded and in a dying condition, but was rational, and appreciated his condition, and stated that he wanted a Christian burial, and where he wanted to be buried, and that he wanted a headstone at his grave; told where his money was, and by whom and how he was wounded, a sufficient foundation for the admission of the declarations is shown.—*Id.*
7. It is not error for the court to refuse to require the state to call a witness whose name was indorsed on the information where she was not an eyewitness and was not present at the time of the shooting and the materiality of her evidence was not shown.—*Id.*
8. Evidence in the case at bar reviewed and held to amply sustain and justify the verdict and judgment.—*Id.*
9. It is the duty of the court upon a trial for murder, where all the degrees of homicide are submitted to the jury as issues to be passed upon and determined, to clearly define in its instructions each degree of homicide of which the defendant could be convicted.—*State v. Baker*, 160.
10. Where no other definition of murder in the second degree is given by the court in its instructions than that which is found in the words of the statute attached to the definition of murder in the first degree, to wit, "all other kinds of murder shall be deemed murder in the second degree" the omission is error, as such definition does not distinguish it from murder in the first degree and manslaughter so that the jury could determine from the evidence of which of the degrees defendant was guilty.—*Id.*
11. An instruction that "if the jury believe from the evidence that the defendant had been injured or received provocation from the person killed, whatever that injury or provocation might have been, yet if, after receiving such injury or provocation, there should have been an interval between the provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and shall be deemed murder in the first degree," while not fatally defective when considered with the whole charge, is unnecessarily narrowed in omitting the words of the statute qualifying provocation, and also all reference to "time for the passions to cool" in referring to the interval of time for the voice of reason to be heard.—*Id.*
12. On trial for burglary, where an entry with intent to steal an overcoat is charged against two defendants, an instruction that the state must prove that each defendant had the intent to steal the specific coat when entering the store is proper. (*Territory v. Duncan*, 5 Mont. 478; *Territory v. Willard*, 8 Mont. 328, cited.)—*State v. Carroll*, 216.
13. Under the constitution (art. III, § 16) and the Criminal Practice Act (§ 9) the accused, in a criminal prosecution, is entitled to meet the witnesses against him face to face, and it is therefore error in a criminal trial, where the prosecuting witness was not within the state, to admit in evidence the committing magistrate's general recollection of the testimony which such witness gave at the preliminary examination.—*State v. Lee*, 248.
14. Granting or refusing separate trials to defendants informed against jointly for misdemeanor is a matter within the discretion of the trial court, and in the absence of an abuse of discretion its action will not be disturbed.—*State v. Davis*, 382.

15. Defendants being tried jointly, and being represented by different counsel, are each entitled to cross-examine the witnesses for the state through the medium of their respective counsel.—*Id.*
16. An appeal by the state from an order granting the defendant a new trial in a criminal action is not authorized by the third subdivision of section 396 of the Criminal Practice Act, allowing an appeal upon a question of law reserved by the state. (*Territory v. Laun*, 8 Mont. 324, reviewed. HARWOOD, J., dissenting.)—*State v. Northrup*, 522.
17. While not necessary to the decision of the case at bar the court expressed its view that an information which otherwise properly and fully charged murder in the first degree should not be held bad where the concluding words simply stated that defendant had committed murder, without stating the acts which he did or that he did them of malice aforethought. (*Territory v. Young*, 5 Mont. 244, cited.)—*Id.*
18. A conviction in a prosecution under section 60 of the Criminal Laws, making an assault with a deadly weapon a felony, when made with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, can be followed only by punishment for misdemeanor where the jury found the defendant guilty "of an assault with a deadly weapon," as such verdict lacks the elements required to constitute the felony.—*State v. Eschbach*, 399.
19. Where a defendant has been twice tried before the expiration of the second term after the filing of the information, and the state prosecutes an appeal from an order granting him a new trial after a conviction on the second trial, which appeal was finally held to be unauthorized, and during the pendency of such appeal two terms elapsed without another trial, this is not a denial to the accused of the speedy trial guaranteed him by the constitution (Art. III, § 16), nor does it entitle him to be discharged by virtue of section 303 of the Criminal Practice Act, requiring one indicted for an offense and committed to prison to be brought to trial before the end of the second term of the court, having jurisdiction of the offense, which shall be held after the indictment is found. (HARWOOD, J., dissenting.)—*State ex rel. Northrup v. Conrow*, 552.

DAMAGES.

From overflow of waters, see NEGLIGENCE, 1.

In ejectment, sufficiency of complaint, see PLEADING, 6.

In claim and delivery, measure of, see CLAIM AND DELIVERY, 2.

DECISIONS OF SECRETARY OF THE INTERIOR.

See NORTHERN PACIFIC GRANT.

DECISIONS OF THE UNITED STATES SUPREME COURT.

A decision of the supreme court of the United States upon a statute which is the same in effect as a Montana statute is controlling upon the supreme court of this state in passing upon the latter statute, where such decision was rendered, and the acts complained of occurred, while the state was one of the territories of the United States.—*Choate v. Spencer*, 127.

DEEDS.

Consideration in, *prima facie* evidence, see EVIDENCE, 5.

1. It is not an absolutely essential requisite to the validity of a deed that there be a manual delivery to the grantee, but when there is an intention manifested

by acts or by words on the part of the grantor to make the instrument his deed the delivery is complete.—*Martin v. Flaherty*, 96.

2. Where it did not appear that the grantor of lands had ever made a manual delivery of the deed to her daughters who were the grantees, but that on the day the deed was executed had received from them a life lease of the same lands as were conveyed and some months later in company with one of the grantees deposited the deed and lease in a bank with a written direction thereon that they be delivered to her, and, in case of her death, to one of the grantees, after which she spoke of the "girl's deed" as being in the bank, and occupied the premises until her death, such facts show a delivery of the deed and complete consummation thereof before the death of the grantor.—*Id.*
3. A contract by the vendor of land to make and deliver a deed to the vendee that "shall convey the said premises," is not complied with by the mere delivery of a warranty deed so as to prevent the recovery of the purchase money paid under the contract where it is subsequently determined that the vendor had no title to convey.—*Colburn v. Northern Pacific Railroad Company*, 476

DEFAULT.

Judgment by, power of justice to vacate, see JUDGMENTS, 4.

Judgment by, motion to vacate, sufficiency of, see JUDGMENTS, 5.

DELIVERY.

Of deed, sufficiency of, see DEEDS, 1, 2.

Of goods sold, sufficiency, see SALES, 3.

DISTRICT COURTS.

Jurisdiction to appoint receiver, see RECEIVER, 1.

DOCKET FEE.

See COSTS, 3, 4.

DYING DECLARATIONS.

See CRIMINAL LAW, 5, 6.

EJECTMENT.

Sufficiency of complaint in action of, see PLEADING, 6.

Receiver in action of, when improper, see RECEIVERS, 1.

Cross-examination of witness in action of, see WITNESSES, 1.

ELECTIONS.

Mandamus to compel canvass of election returns, see MANDAMUS, 4, 6.

1. The duties of a county canvassing board are ministerial, and such board has no authority to exclude the returns of an election precinct, regularly made, upon the ground that the voting was shown by affidavits to be illegal, and having done so may be compelled by *mandamus* to canvass such returns. (*State ex rel Pigott v. Board of Canvassers of Cassadee County*, 13 Mont 537; *Chumazero v. Polls*, 2 Mont. L270, cited.)—*State ex rel Leech v. Board of Canvassers of Chouteau County*, 28.
2. Where a county canvassing board issued a certificate of election to a candidate for the legislative assembly after unlawfully excluding the returns of a particular precinct, and then adjourned *sine die*, such board may be compelled by *mandamus* to reconvene and canvass the returns so excluded, and issue a certificate of election to the person shown by a complete canvass to be entitled thereto.—*Id.*

3. Where the genuineness and regularity of the returns of an election precinct were not questioned by the county canvassing board at the time of making the canvass, but such returns, having been received through the proper course of the mail, were treated at the time as worthy of full credit, and the names of the candidates for members of the legislative assembly and the number of votes received by each at such precinct could be readily ascertained by such board upon an inspection of the poll-book, but which returns were excluded by such board for a reason not apparent on its face, it is no defense to an alternative writ issued in a *mandamus* proceeding to compel the board to can, vass such returns, that the blank return in such poll-book was not filled in nor the certificate thereto properly attested, as such defects would not have been grounds for rejecting the returns. Section 5 of the act of March 17, 1891 (Laws, 2d Sess., p. 301), providing in substance that a failure to fill out all the certificates in a poll-book or a failure to perform any other act in the making up of returns that is not essential to determine for whom the votes were cast, is not such an irregularity as to entitle the board to reject the same.—*Id.*
4. An allegation in an answer to an alternative writ of mandate, issued to compel a county canvassing board to canvass the returns of a precinct which it had excluded, stating that it appeared, from an inspection of the registration list and of the list of persons returned as voting at said precinct, that sixteen names of persons, naming them, appeared upon the list of persons returned as voting at said precinct, which said sixteen persons did not appear to have ever been registered as voters at said precinct, and no surrendered certificates of registration were transmitted by the judges of election to the clerk of the board of county commissioners in connection with, or as a part of, the election returns of said precinct, or in any manner whatever, and it appeared from said returns that said sixteen persons were not entitled to vote at all at said election, presents an issue which should be tried.—*Id.*
5. Although no check lists of such precinct or surrendered certificates were ever sent to the county clerk by the judges of election, it was the duty of the board of canvassers to have procured the check lists and such certificates before rejecting the vote of the precinct as returned by the poll-book alone.—*Id.*
6. No illegal votes were shown by the returns to have been cast at such precinct where it appeared that the check list contained the names of forty-six voters, five of whom failed to vote; that five electors voted upon country registry certificates, and that the list of voters returned by the poll-book consisted of forty-six names, in sixteen of which there occurred some difference in the spelling of the names as written by the registry agents and by the clerks of election, or a difference occurring by way of using initial letters for the Christian name in one case and writing it at length in the other, or the dropping of an initial, but each of which names could be indentified with a name upon the check list.—*Id.*
7. A certificate of nomination to an office by a political party, regular on its face and filed with the proper officer as required by section 4 of the Montana ballot law (act of March 12, 1889), is a *prima facie* evidence of the nomination of the person whose name appears upon the official ballot as the candidate of that party.—*State ex rel. Pigott v. Benton*, 306.
8. Where a political convention delegated to a committee the power to nominate a candidate for an office, evidence by the secretary of such committee who certified such nomination to the proper officer, that he was not present at any meeting of the committee when a formal resolution was offered and a vote taken for the nomination of a candidate for such office; that he was present at a committee meeting when such candidate received the nomination, but could not name the particular meeting; that such meeting was held

at several places, several committeemen being present; that several meetings were held at which such candidate's name was decided on, but no written minutes were kept, is insufficient to overthrow the *prima facie* evidence of the certificate of nomination. (HARWOOD, J., dissenting.)—*Id.*

9. The Montana ballot law does not forbid a political convention from appointing and delegating to a committee power to make nominations for office, and a nomination made by such committee after the adjournment of the convention is in effect the act of the convention and therefore valid. (HARWOOD, J., dissenting.)—*Id.*

ESTOPPEL.

By judgment, must be pleaded, see PLEADING, 4.

Of husband to deny authority of wife to purchase goods not necessaries, see HUSBAND AND WIFE, 4.

As to tenant in common of mining claim, see MINES AND MINING, 1, 2.

To deny right of corporation to hold mining property, see MINES AND MINING, 4.

EVIDENCE.

Bill of sale as, in conversion, see SALES, 1.

Dying declarations, see CRIMINAL LAW, 5, 6.

Certificate of nomination as, see ELECTIONS, 7, 8.

1. A notice of *lis pendens* filed on the commencement of an action to compel the reconveyance of land is admissible on the trial for the purpose of framing a decree should the plaintiff prevail.—*Leggatt v. Leggatt*, 190.
2. In an action to compel a reconveyance of land, alleged to have been procured through fraud, testimony to the effect that defendant, who was the attorney in fact of plaintiff and in a fiduciary relation to her, could have realized more for her land by selling the lots separately than by selling them all together, is admissible, particularly where it was conceded that the price paid by defendant was not a fair or just price.—*Id.*
3. In such action evidence tending to show the value of the land at the time of the trial, which was three years after the conveyance to defendant, was properly excluded.—*Id.*
4. In such action, testimony as to the value of the land several years before the transaction between plaintiff and defendant, and that it had not depreciated, is admissible upon the question of the value of the land at the time of such transaction.—*Id.*
5. In such action, where an accounting for profits is sought, the considerations named in certain deeds made by the defendant after obtaining the property may be properly read in evidence, for, while the price named in a deed is not conclusive, it is at least *prima facie* evidence tending to show what the consideration was.—*Id.*
6. Where a certain portion of the premises had been mentioned by defendant, it was a matter of discretion with the trial court to permit plaintiff to show the value of such premises in rebuttal, and, where no injury results, the action of the court will not be held error.—*Id.*
7. Where a large indebtedness by a defendant company to one of its trustees existing after the company had been in business but a few months is sought to be proved fraudulent, a declaration by such trustee to a third party made at the time the company was incorporated, that the company had started with a clean balance sheet, is admissible.—*Josephi v. Macy Clothing Company*, 195.
8. Under the constitution (Art. III, § 16) and the Criminal Practice Act (§ 9) the accused, in a criminal prosecution, is entitled to meet the witnesses against him face to face, and it is therefore error in a criminal trial, where the prosecuting witness was not within the state, to admit in evidence the committing

magistrate's general recollection of the testimony which such witness gave at the preliminary examination.—*State v. Lee*, 248.

9. In an action for personal injuries a witness who has testified to facts contemporaneous with the injury and closely connected with the main fact may be cross-examined as to the entire case, especially where such witness was a collaborer to whose incompetency plaintiff attributed his injury.—*Jorgenson v. Butte and Montana Commercial Company*, 288.
10. Parol evidence of an agreement that the acceptance of a bill of exchange should not be a waiver of counterclaims which the acceptor then held against the drawer is admissible in an action on the bill, as such evidence contradicts not the instrument, but merely the presumption of waiver which arises from the fact of its acceptance.—*Bohn Manufacturing Company v. Harrison*, 298.

EXECUTIONS.

Exemption of homestead in partnership property, see HOMESTEAD.

The fact that an execution issued upon a judgment within five years after its rendition was never returned will not prevent the granting of leave to issue an execution after that time, under section 349 of the Code of Civil Procedure, providing, that after five years from the entry of judgment, execution can only issue by leave of the court upon motion with proof that the judgment of some part thereof remains unsatisfied, but the leave shall not be necessary when the execution has been issued on the judgment within five years, and returned unsatisfied in whole or in part.—*Northern Pacific Railroad v. Bender*, 432.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. A judgment in an action for forcible entry and detainer for the restitution of the possession of the land and the recovery of three dollars, being treble its rental value, is in conformity with a verdict finding the defendant guilty and fining him one dollar, and further finding the monthly rental value of premises to be one dollar, there being special findings that plaintiff was in actual possession at the time defendant entered forcibly and detained possession.—*Missoula Electric Light Company v. Morgan*, 394.
2. A justice of the peace has jurisdiction of an action by a landlord against a tenant holding after default in payment of rent both under the forcible entry and unlawful detainer act (Code of Civil Procedure, § 716 et seq.), and by virtue of section 21, article VIII, of the constitution, clothing such courts with concurrent jurisdiction with the district courts in cases of forcible entry and unlawful detainer.—*State ex rel. Carter v. Votaw*, 403.
3. The rule that a tenant cannot dispute his landlord's title may be invoked by the administrator of a deceased landlord under section 727, Code of Civil Procedure, authorizing the heirs, executors, administrators, assigns, agent, or attorney of the lessor to proceed against the tenant on a breach of the lease the same as the lessor might have done.—*Id.*
4. In an action for the possession of leased premises against a tenant holding over after default in rent, judgment may be rendered on the pleadings for the plaintiff when the tenant's answer admits having leased the premises from plaintiff's intestate, and being in default for rent, although he may have denied plaintiff's right of possession.—*Id.*
5. Entering upon premises and procuring the possession thereof from the agent and servant of the party in possession by threats of arrest if he does not surrender them within two hours is a forcible entry and detainer within section 716 of the Code of Civil Procedure defining such offense to be constituted, *inter alia*, by a peaceable entry and the turning out by force, or frightening by threats, or other circumstances of terror, the parties out of possession, and

detaining and holding the same. (*Sheehy v. Flaherty*, 8 Mont. 365; *Faber v. Ternian*, 1 Mont. 179, cited.)—*Wells v. Darby*, 504.

FRAUD.

In procuring conveyance of land, see EVIDENCE, 2, 3, 4, 5, 6, 7.

HABEAS CORPUS.

1. It is a proper exercise of discretion on *habeas corpus* to award to a mother the custody of a child between nine and ten months old, and not of robust health, where no attempt is made to show that she is immoral or in any way unfit to care for the infant, and her parents are willing to provide for it.—*State ex rel. Newell v. Newell*, 802.
2. A *habeas corpus* proceeding is a special proceeding in the nature of an action, the disposition of the writ is a judgment, and the relator a plaintiff, within the meaning of section 495 of the Code of Civil Procedure, allowing costs to the plaintiff upon a judgment in his favor in special proceedings in the nature of an action.—*Id.*
3. One who invokes the writ of *habeas corpus*, without meritorious cause, may be properly taxed with the costs of the proceedings under § 506 of the Code of Civil Procedure. (*State ex rel. Newell v. Newell*, ante, page 302, cited.)—*State ex rel. Shannon v. Reynolds*, 423.

HOMESTEAD.

Not exempt from sale to satisfy lien of materialman, see MECHANIC'S LIEN, 11.

A partner is entitled as against the creditors of the firm to claim and hold a homestead in the partnership estate, under section 322 of the Code of Civil Procedure exempting a homestead, to be selected by the owner, from forced sale on execution or other final process. (*Lindley v. Davis*, 7 Mont. 206, reviewed.)—*Ferguson v. Sprith*, 487.

HUSBAND AND WIFE.

1. A chattel mortgage containing a complete description of the separate property of a married woman, executed by her and filed and properly indexed in the county recorder's office, is a sufficient list and record within section 1432, fifth division, of the Compiled Statutes (act of 1872), exempting the property of a married woman from her husband's debts when mentioned in a list thereof on record in such office, no particular form of the list or method of record being provided for. (*Griswold v. Boley*, 1 Mont. 556, cited.)—*Kelley v. Jefferis*, 170.
2. Section 1439, fifth division, of the Compiled Statutes (act of 1887), declaring in effect that women shall retain the same legal existence after marriage as before, and receive the same protection of her rights as a woman as her husband does as a man, and shall have the same right as her husband to appeal to the courts for redress for injuries to her person or property, so modifies the act of 1872 (§ 1432) as to enable a married woman to hold her separate property as against her husband's creditors without having a list thereof on record, on showing facts establishing her individual title thereto.—*Id.*
3. The said act of 1887 is a legislative direction to the courts of this state, where a united jurisprudence of equity and law is administered, to disregard the ancient common-law fiction of the merger of a wife's legal personality in that of her husband, and to enforce and protect the rights of a married woman according to the doctrines of equity which considered her a *feme sole* as to her separate property.—*Id.*
4. A husband who has notified a merchant not to let his wife run any bills unless accompanied by his order is estopped to deny the right of his wife to purchase

certain goods not necessaries, where it appeared that at the time of their purchase he was present and examined some of the goods and offered no protest or objection, giving her a check in the presence of the merchant to apply on the purchase, and that the goods were delivered at a residence of the husband where his wife resided and he part of the time, and where he saw some of the goods, but which he did not offer to return after knowing they had been charged to him.—*Kreiger v. Smith*, 233.

5. One indebted to a married woman for board and lodging furnished by her and upon a debt due her husband which he had assigned to her, cannot question her competence to maintain an action upon such indebtedness because she had not first complied with the sole traders' act or the provisions for filing a separate property list, as such considerations relate to the rights of the husband and creditors.—*Strayer v. Leonard*, 435.

INFANCY.

Of party, disclosed on trial, see PARTIES, 2, 3.

Custody of infant on *habeas corpus*, see HABEAS CORPUS.

INJUNCTION.

In action between parties for an accounting, when improper, see PARTNERSHIP, 3.

1. Attorney's fees paid to procure the dissolution of an injunction are recoverable as an item of damages in an action on the bond given in the injunction suit.—*Creek v. McManus*, 152.
2. In an action upon an injunction bond where attorney's fees paid to procure a dissolution of the injunction are sought to be recovered as damages, testimony by the plaintiff that she paid a certain fee to an attorney for "dissolving the temporary injunction," and "to resist the perpetual injunction," tends to prove such item of damages without apportioning the fee between the two services, where the right to an injunction was the only cause of action set up in the suit in which such bond was given, and the only service that was or could have been rendered by the defendant's attorney in the injunction suit was confined to defeating the injunction, whether by motion or by a trial of the case. (*Miles v. Edwards*, 6 Mont. 180, cited; *Campbell v. Metcalf*, 1 Mont. 378; *Allport v. Kelley*, 2 Mont. 348; *Parker v. Bond*, 5 Mont. 14, distinguished.)—*Id.*
3. Injunction will lie at the suit of a contractor, having a valid contract with a city to pave and curb a street, and who is liable to penalties for its nonperformance, to enjoin trespassers who obstruct and delay the performance of the work and threaten to continue such acts, where the injury is continuous and repeated, and actions at law for damages against such trespasser would involve a multiplicity of suits.—*Palmer v. Israel*, 209.
4. An injunction will lie to restrain a water company from shutting off the entire water supply of a brewery in violation of a contract which it had assumed, when such act would stop the brewing, and involve the destruction of large quantities of malt, and loss of trade.—*Horsky v. Helena Consolidated Water Company*, 229.

INSTRUCTIONS.

Review on appeal, see APPEAL, 6, 12.

Directing verdict, see NONSUIT, 1, 2, 3.

Upon trial for murder, duty of court, see CRIMINAL LAW, 9.

Upon trial for murder, sufficiency of, see CRIMINAL LAW, 10, 11.

In action for damages from overflow, see NEGLIGENCE, 1.

As to measure of damages in claim and delivery, see CLAIM AND DELIVERY, 2.

As to possession and representation of mining claim, see MINES AND MINING, 6, 7, 8, 9, 10.

JUDGMENT.

On demurrer in foreclosure of lien, see MECHANIC'S LIEN, 10.

Validity, on defective summons, see SUMMONS, 1, 2, 3, 4.

Form of, in forcible entry, see FORCIBLE ENTRY AND UNLAWFUL DETAINER, 1.

Estoppel by, must be pleaded, see PLEADING, 4.

Mortgagor not entitled to personal, against co-mortgagor, see CONTRIBUTION, 2.

On the pleadings, see PLEADING, 3, 7.

On the pleadings, see FORCIBLE ENTRY AND UNLAWFUL DETAINER, 4.

1. Where a plaintiff elects to stand on his complaint after demurrer sustained, it is the duty of the court to render judgment against him for costs so as to place him in a position to appeal; and where the plaintiff is compelled to ask the court to enter such judgment, it is not such a consent to the judgment as to debar him of the right to appeal.—*Stevenson v. Matteson*, 108.
2. A judgment sustaining a demurrer, and dismissing the complaint as to one of several defendants, is a final judgment from which an appeal will lie.—*Id.*
3. The provision of section 119 of the Code of Civil Procedure, that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect, does not apply to an action where jurisdiction has not been properly acquired—*Choate v. Spencer*, 127.
4. A justice of the peace upon a proper showing has power to set aside a default and judgment entered thereon, and allow a defense to be interposed under section 804, title XVIII, of the Code of Civil Procedure, relating to procedure in justices' courts, which provides that the provisions of the Code of Civil Procedure relative to practice, pleading, and trial in the district courts shall, so far as applicable, be observed in justices' courts, section 116 of such code permitting default judgments to be vacated in the district court in certain cases. (*Gage v. Maryatt*, 9 Mont. 265; *Pincus v. Dowd*, 11 Mont. 88, cited.)—*Schwabe v. Lissner*, 214.
5. It is not an abuse of discretion to refuse to open a default when it appears that defendant's counsel was present in court when his motion to strike out was denied, and an order made to answer in ten days; where such counsel asserted that, after filing such motion he had no further notice of the proceedings, or of any action of the court in said cause for more than a month after the judgment was rendered; that for several months prior to the rendition of the judgment, and at the time thereof, he was ill, and during such time had an understanding with all attorneys practicing at that bar that none of his cases should be set for trial without notice to him, or until other counsel could be employed, in which arrangement he believed plaintiff's attorney was included, but which plaintiff's attorney denied, there having been ample time for the substitution of counsel had it been necessary, and it not appearing that defendant's counsel was not so far disabled as to prevent his being about to a considerable extent during the period mentioned, and counseling with defendant.—*Haggin v. Lorents*, 406.
6. A court of general jurisdiction has inherent power to supply a missing record in a cause within its jurisdiction, and therefore, where a judgment was rendered in a territorial court, while sitting as a federal court, and the record book in which such judgment was entered was transferred to the United States circuit court upon the admission of the state into the union, it is proper for the district court, which, under the enabling act had succeeded in jurisdiction of the case, to cause such judgment to be entered in its judgment book.—*Work v. Northern Pacific Railroad Company*, 438.

JURISDICTION.

Of supreme court to issue writ of mandate, see MANDAMUS, 2, 8.
In prosecution for uttering forged instrument, see CRIMINAL LAW, 8.
To appoint receiver, see RECEIVER, 1.

JURORS.

Challenge to in equity case, see TRIAL, 2.

An agreement by a jury to return a "quotient verdict," whereby each member was to indicate the amount for which he thought the verdict should be, and the sum of such amounts divided by twelve should be the verdict, with an agreement to abide by such quotient, shown by the affidavits of jurymen who were induced to assent to a verdict so reached on account of such agreement, is a resort to the determination of chance, and within section 296, subdivision 2, of the Code of Civil Procedure, allowing a new trial for such misconduct on the part of the jury.—*Gordon v. Irevarthan*, 387.

JUSTICE OF THE PEACE.

Power to vacate default judgment, see JUDGMENTS, 4.

Errors of, not reviewable on appeal, see APPEAL, 11.

Jurisdiction of, not reviewable on appeal, see APPEAL, 18.

Jurisdiction of, in forcible entry and unlawful detainer, see FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2.

Order by, forfeiting bail, how reviewed, see CERTIORARI, 3.

1. An application for a change of venue in a justice court, supported by an affidavit making a proper showing, terminates the jurisdiction of the justice for further action other than transferring the cause to another justice.—*State ex rel. Gleim v. Evans*, 239.
2. An application for a change of venue in a justice court is made in time when made upon the day to which a case has been continued after a plea of not guilty, but before the trial has commenced.—*Id.*
3. The forfeiture of a defendant's bail in a misdemeanor case before a justice of the peace for failure to be present at the time of trial, when represented by counsel present, is unwarranted under section 478 of the Criminal Practice Act, providing that the defendant must be personally present before the trial can proceed, as such provision is intended for the protection of the accused, and does not control section 200 of the Criminal Practice Act, providing that if the defendant is charged with a misdemeanor, his personal presence is not necessary, and he may appear, be arraigned, and plead by counsel.—*Id.*
4. A justice of the peace has no authority upon declaring a defendant's bail forfeited to turn over to the county attorney money which had been deposited by the defendant in lieu of a bail bond, but he should certify and return the same to the district court, as required by section 504 of the Criminal Practice Act, in case of the breach of any recognizance.—*Id.*

LANDLORD AND TENANT.

Administrator of deceased landlord may estop tenant disputing title, see FORCIBLE ENTRY AND UNLAWFUL DETAINER, 8.

LARCENY.

By bailee, see CRIMINAL LAW, 1.

LIS PENDENS.

See EVIDENCE.

LOST INSTRUMENT.

Tender of indemnity before suit upon, see NEGOTIABLE INSTRUMENTS.
 Power of court to supply missing record, see JUDGMENT, 6.

MANDAMUS.

To compel canvass of election returns, see ELECTIONS, 1, 2, 3, 4.

To compel trustees to restore school, see SCHOOLS, 2.

To compel district court to reinstate appeal, see DISTRICT COURT.

1. Where a taxpayer has taken an appeal to the district court from an allowance by a board of county commissioners of a claim against a county, as permitted by sections 784, 785, fifth division of the Compiled Statutes, and thereafter a judgment by default is rendered by such court upon the failure of the board to appear, adjudging such claim illegal and setting aside the allowance of the same, without a trial or inquiry of any character respecting its merits, such judgment is unauthorized, and constitutes no defense to an application for a writ of *mandamus* to compel the payment by the county treasurer of a warrant issued in payment of such claim, as the statute relating to appeals in such cases, not requiring notice of the appeal to be given to the holder of the warrant, contemplates that the district court will review the proceedings of the board of county commissioners. HARWOOD, J., concurs in the issuance of the writ, holding that the judgment declaring the claim void solely for the default of the board of county commissioners was unwarranted, as such board, having no interest in supporting the claim, was not the real party in interest or the proper party respondent or defendant. DE WITT, J., concurs in the issuance of the writ, holding that the district court acquired no jurisdiction of the appeal, in that the notice of appeal required to be served upon the clerk of the board was only filed with him, and that such filing was not a service. (*Citing Territory v. Hanna*, 5 Mont. 246; *State v. Gibbs*, 10 Mont. 210.)—*State ex rel. Cope v. Minar*, 1.
2. An alternative writ of mandate may be issued in vacation upon the order of the presiding justice of the supreme court.—*State ex rel. Leech v. Board of Canvassers of Chouteau County*, 23.
3. The supreme court has original jurisdiction to issue a writ of mandate. (*State ex rel. Thompson v. Kenney*, 9 Mont. 223; *In re Mac Knight*, 11 Mont. 126, cited.)—*Id.*
4. Under the act of March 7, 1892 (2d Sess., p. 209), the members of a county board of canvassers do not necessarily embrace the same officers, but are subject to changes which depend upon circumstances, and therefore a writ of mandate issued to compel such board to reconvene and canvass the returns from an election precinct which they had excluded is properly directed to the particular individuals comprising the board, describing them by name, and as constituting the board of county canvassers of election returns for a certain county and state, the particular members of such board at the time in question being the persons against whom obedience must, if necessary be enforced.—*Id.*
5. Alternative writ of mandate which states generally the acts which the parties have omitted to do, and which they are required to perform, is sufficient under section 586, of the Code of Civil Procedure, providing that the writ shall state generally the allegation against the party to whom it is directed. The word "generally" having the same meaning as the word "general" in section 68 of the Code of Civil Procedure, requiring the summons to contain the "general nature of the action."—*Id.*
6. A county canvassing board in its answer to an alternative writ of mandate issued to compel such board to canvass the returns of a particular precinct which it had excluded is not confined to the reason incorporated in the official

record of its proceedings as ground for excluding such returns, but may specify other defenses.—*Id.*

7. The state auditor cannot be compelled by *mandamus* to draw his warrant on the fund appropriated for rewards for a given fiscal year in favor of a person entitled to such reward where the conviction of the criminals for whom the reward was offered was not had until after the expiration of such fiscal year, when such fund had been transferred to the general fund by the state treasurer as required by law.—*State ex rel. Bywater v. Cook*, 465.
8. *Mandamus* is the proper remedy to reinstate in the district court an appeal properly brought within its jurisdiction, but which it dismissed on the ground of want of jurisdiction.—*State ex rel. Kellogg v. District Court of First Judicial District*, 370.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See NEGLIGENCE, 2.

MECHANIC'S LIEN.

1. In the trial of an action to foreclose a mechanic's lien it is not necessary to prove the filing of the lien before evidence can be offered that the materials entered into the construction of the building.—*Bardwell v. Anderson*, 87.
2. A complaint on foreclosure of a mechanic's lien which alleges that the defendant contractor entered into an agreement with the defendant owners whereby the former furnished materials and erected a building upon certain described land of the latter and bought of plaintiff's assignor certain materials of an agreed value, "and which were used in and entered into the construction of said brick building aforesaid," sufficiently shows that the material was furnished for the building upon which the lien was claimed.—*Id.*
3. It is no objection to a lien account that the price of each item is not shown where the aggregate price is given and the account is otherwise itemized with great particularity as to the various materials furnished so that it can be readily ascertained whether such materials were used in the structure and whether the prices charged therefor were reasonable.—*Id.*
4. An objection to the introduction in evidence of a lien account "that the paper purporting to be a lien is in nowise a charge upon the property described in the complaint and in the lien" will be disregarded on appeal as specifying no ground.—*Id.*
5. An objection that the statute does not provide a lien for a subcontractor unless that subcontractor has a contract relation with the owner of the property, made to the introduction in evidence of a lien account, tendered by copy attached to the answer, presents the question whether the evidence offered by plaintiff is sufficient in law to sustain a judgment in their favor which is a question that should be raised by demurrer or upon the summing up of the case and not while plaintiff were attempting to prove the allegations of their complaint by competent evidence.—*Id.*
6. An objection to the introduction in evidence of a lien account, which was made a part of the complaint, that there is nothing in said lien or account therewith filed which in any manner operates as a notice to the defendants, of the materials or the value thereof which are alleged to have been furnished for said building, presents questions which should have been raised by demurrer, or not having been so raised, should not be considered until the evidence is in, and the court applies the law to the facts shown.—*Id.*
7. There is no inconsistency between the lien account and the complaint where the lien account stated a certain amount as per agreement and another amount as

the reasonable value, and the complaint alleged the price of the goods furnished as being both the agreed price and the reasonable value.—*Id.*

8. A notice of lien which describes the property as lot 14 in a certain block and city plat cannot sustain a lien for materials used in the erection of a building on lot 18, as such description, being neither uncertain, defective, or ambiguous, cannot be aided or explained by oral evidence, and is therefore not within section 1871 of the fifth division of the Compiled Statutes, providing that any error or mistake in the description shall not affect the validity of the lien, provided the property may be identified by such description.—*Goodrich Lumber Co. v. Davis*, 76.
9. The description of the buildings upon the lands sought to be charged with a lien as "that a certain frame building and outhouses" is insufficient to identify the property, as such description would apply to many other premises in a large city upon which such buildings stood, particularly where the lienor does not depend upon such description but gives a "more particular description" by lot, block, and official plat.—*Id.*
10. Where the action is upon an account and to foreclose a lien for materials furnished by the plaintiff, the owner, contractor, and a mortgagee being made defendants, it is error for the court upon sustaining demurrers of the owner and mortgagee to the complaint, to render judgment that the plaintiff take nothing by its complaint, as a cause of action was stated against the contractor on the account for materials, and such judgment will be modified accordingly.—*Id.*
11. A homestead is not exempt from foreclosure and sale to satisfy a lien for materials used by the owner in the improvement thereof, such lien being a "Mechanic's Lien" within the meaning of section 323 of the Code of Civil Procedure providing that the exemption of homesteads from forced sale shall not affect any laborer's or mechanic's lien. (DE WITT, J., dissenting.)—*Bonner v. Miner*, 269.

MEDICAL EXAMINERS.

Appeal from, see PHYSICIANS AND SURGEONS, 1, 2.

MINES AND MINING.

Partnership in respect to, how created, see PARTNERSHIP, 1.

1. Failure to file an adverse claim to an application for patent to a mining claim does not estop a tenant in common from maintaining an action to quiet title to an interest in such claim against his cotenants, who had obtained the patent, and their grantee, where it was not pleaded or shown that plaintiff was an owner or claimant when application for patent was made, or that his grantors had an interest upon which they failed to adverse.—*Butte Hardware Company v. Cobban*, 351.
2. Where the patentees of a mining claim do not controvert the existence of a trust in favor of a third person as to an undivided interest in such claim, their grantee who obtained quitclaim deeds for a grossly inadequate consideration, and with notice that his grantors claimed no title to such interest is not an innocent purchaser for value, and therefore not entitled to an estoppel of the equitable owner of such interest, and the patentees will be decreed to convey to their *cestui que trust*.—*Id.*
3. In an action to quiet title and remove a cloud upon an undivided interest in a mining claim, a finding that defendant had built a foundation for a house which was partly upon a portion of said premises is not a finding that he was in possession of plaintiff's undivided interest in the claim, or that plaintiff was not in such possession.—*Id.*

4. A party claiming title to a mine through a commercial corporation is estopped to question the right of such corporation to take and hold title to mining property. (*First National Bank v. Roberts*, 9 Mont. 831, cited.)—*Id.*
5. In an action instituted under section 2326, Revised Statutes of the United States, to determine the right of possession to a quartz mining claim, wherein it was determined that neither party had established a title, a reversal of the judgment on defendant's appeal, upon the ground that a demurrer to the complaint should have been sustained, vacates it entirely, together with all proceedings subsequent to the demurrer, and therefore an amended complaint filed after such reversal will not be stricken out upon the theory that the judgment still stood in force as an adjudication of plaintiff's rights.—*Matttingly v. Lewisohn*, 508.
6. In an action to determine the right of possession to a mining claim, it is proper to instruct the jury that the declaratory statement required to be filed by the locator of a mining claim, and recorded in the office of the recorder of the county in which the claim is located, must be on oath. (*Metcalf v. Prescott*, 10 Mont. 283, cited.)—*Id.*
7. In such case an instruction, in effect, that it was not necessary for the plaintiffs to prove annual representation of their claim, is proper, where there was no issue raised by the pleadings in respect thereto.—*Id.*
8. In such case an instruction upon the issue of annual representation is not prejudicial to defendant which states that there is no dispute that seventy-five dollars' worth of work was done on defendant's claim, but that as to the remaining twenty-five dollars the fact is disputed, and the evidence conflicting, where the actual amount in dispute was but a few dollars less.—*Id.*
9. An instruction which correctly states the requirements of the law in respect to annual representation cannot be held erroneous in that it exacts too rigid a compliance with the letter of the mining laws.—*Id.*
10. In such case an instruction upon the question of annual representation, that, in estimating the amount of work or improvements, the test is not what was paid for it, but depends entirely upon whether or not said work or improvements were reasonably worth the sum of one hundred dollars, is proper, and is not susceptible to the construction that the value of the claim must have been enhanced by such work.—*Id.*

MORTGAGES.

Right of mortgagor to contribution, see CONTRIBUTION, 1, 2, 3.

MOTION IN ARREST OF JUDGMENT.

Jurisdiction of a justice not reviewable on, see APPEAL, 18.

NEGLIGENCE.

1. A person engaged in a legitimate business is only liable to another for such injuries as result from negligence or the want of ordinary care and prudence in the management thereof, and therefore, in an action for damages for causing an overflow of plaintiff's land by floating logs down a stream it is error to charge that though the defendant's business was legitimate it must so conduct it as not to cause injury to the plaintiff, and if the defendant's logs had jammed, forming a gorge which retarded the natural flow of the stream, and the gorge was suddenly released, causing plaintiff's lands to be submerged, he was entitled to recover, as such charge practically ignores the question of negligence. (*Bielenberg v. Montana Union Ry. Co.*, 8 Mont. 271, cited.)—*Hopkins v. Butte and Montana Commercial Company*, 223.
2. An instruction to find for the defendant upon the conclusion of plaintiff's testimony is proper in an action by an employee for personal injuries alleged to

have been caused by the incompetency of a collaborer and unskillful treatment of the wound by surgeons employed by defendant, where the evidence tends to show that plaintiff contributed to his own injuries by disobedience of instructions; that the collaborer was not working with plaintiff at the time; that plaintiff, after being hurt, stated that he alone was to blame, and the evidence fails to disclose any requirement of particular skill on the part of the collaborer or lack of skill if required, or knowledge by defendant of any such incompetency of which plaintiff was ignorant, or that the surgeons were negligent or unskillful.—*Jorgenson v. Butte and Montana Commercial Company*, 288.

3. In an action for personal injuries by an employee against a mining company, where it appeared that plaintiff was injured by an explosion, which occurred while he was at work in clearing up the debris from exploded blasts which had been fired by his fellow-servants, having knowledge that two blasts put in at the same time had not exploded, and it being shown on the trial to be the duty of plaintiff and his fellow-servants to see that every blast exploded, and the evidence being conflicting as to whether this was the foreman's duty, it is proper to instruct the jury that one of the risks which a servant takes upon himself is the negligence of his fellow-servants in the same common employment, and if the injury was occasioned by the negligence of the men engaged in blasting, who, in law, were plaintiff's fellow-servants, and defendant had no reason to believe such men incompetent or careless, then the verdict should be for defendant unless it was the duty of the foreman to superintend the blasting and warn plaintiff of unexploded blasts.—*Kelly v. Cable Company*, 411.
4. An instruction that plaintiff did not claim that defendant's employees were incompetent is proper when the complaint only charged that they were negligent and careless.—*Id.*

NEGOTIARABLE INSTRUMENTS.

Note as evidence of debt, see PLEADING, 1.

Sufficiency of answer in action on, see PLEADING, 3.

Sufficiency of complaint in action on, see PLEADING, 5.

Parol evidence of agreement affecting acceptance of bill of exchange, see EVIDENCE, 10.

1. Tender of indemnity before suit is not necessary to entitle a plaintiff to judgment in an action upon a lost negotiable instrument.—*Schuttler v. King*, 226.
2. Where the payee of plaintiff's note accepted the defendant's offer to buy it for a certain sum, but, after receiving defendant's check for such amount, returned it without having retracted his offer to sell, or objecting to the mode of payment, and defendant, after sending the check, instituted suit on the note, which suit plaintiff settled on the same day by payment in full and on the following day, the note having been sent for collection to a bank in the town where the plaintiff and defendant resided, the plaintiff voluntarily paid it in full a second time, without any request from the bank, and against the advice of defendant, who offered to indemnify him, he will be limited in his recovery in an action against defendant for money had and received, to the amount of the uncollected check so given by defendant to purchase the note.—*Wetzstein v. Joy*, 444.

NEW TRIAL.

See APPEAL.

Error in nonsuit, reviewable on motion for, see APPEAL, 2.

Resort to chance by jurors, see JURORS.

1. Where a notice of intention to move for a new trial fails to state whether the motion will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case, as required by section 298 of the Code of

Civil Procedure, an appeal from an order denying the motion will be dismissed in the absence of a waiver of such defect by the adverse party.—*Gregg v. Garrett*, 10.

2. The mere appearance of respondent's counsel when a motion for a new trial based upon a defective notice is heard does not amount to a waiver of the defects apparent in the notice, and, in the absence of any thing in the record showing a waiver thereof, an appeal from an order denying the motion will be dismissed.—*Id.*
3. It is an abuse of discretion for the trial court to set aside a verdict for plaintiff and grant a new trial for insufficiency of evidence in a suit to recover a balance of an account, where it appeared that the account had been running over a year, during which time numerous payments were made; that defendant was a sole trader, and that the goods were delivered to and consumed by her employees at her places of business, which facts were not disputed, except that the payments were by her husband, who appeared from the evidence to be acting as her agent.—*Falk v. Brown*, 125.
4. A statement on motion for a new trial which is served more than thirty days after an order extending the time of service, although within the period of a subsequent extension which was granted without the consent of the adverse party, will be stricken from the files under section 536 of the Code of Civil Procedure, prohibiting the extension of the statutory time for the preparation of a statement on motion for a new trial to a greater period than thirty days without the consent of the adverse party.—*Doyle v. Gore*, 471.
5. Upon a motion for a new trial the notice of intention to move is the foundation of the proceeding, and a formal written motion is not essential; therefore, where a written motion has been made, its withdrawal and the substitution of another after the time for filing a notice had expired does not constitute, in effect, a withdrawal of the notice of intention to move so as to operate as an abandonment of the proceeding. (*Wallace v. Lewis*, 9 Mont. 899; *Fabian v. Collins*, 2 Mont. 510, cited.)—*Wasil v. Montana Union Ry. Co.*, 500.
6. The submission of a motion for a new trial by consent, without argument, accompanied by a statement by the moving party that the court might pass upon said motion then and there without taking time to consider the same, and that so far as defendant was concerned the motion might then and there be overruled, is not such a consent to the order overruling the motion as would justify this court in refusing to review the order as one entered by consent of the party affected thereby, where it appeared that the remarks were made in view of the fact that the questions involved had theretofore been argued and considered, and appellant understood his time for appealing was about to expire.—*Id.*
7. An appeal by the state from an order granting the defendant a new trial in a criminal action is not authorized by the third subdivision of section 396 of the Criminal Practice Act, allowing an appeal upon a question of law reserved by the state.—*State v. Northrup*, 522.

NONSUIT.

1. A judgment entered upon a verdict which was directed for defendant upon motion at the close of the introduction of both plaintiff's and defendant's testimony, upon the ground of want of sufficient proof on the part of plaintiff to support the material allegations of his complaint, is in effect a judgment of nonsuit, and will be reviewed as such on appeal.—*McKay v. Montana Union Railway Company*, 15.
2. Where a defendant, upon the failure of the plaintiff to prove a sufficient case for the jury, exercises his option to leave the case with the jury or the court for judgment on the merits, relying as well upon the proofs offered for the

defense as well as upon the weakness of plaintiff's case, the decision in such event should not come from the jury, if there be one, by positive direction of the court, as such direction would leave the jury no power to render a verdict on the merits.—*Id.*

3. An instruction to the jury to find for the defendant, given on motion in a civil action at the close of plaintiff's case upon the ground of failure of proof, is in effect a nonsuit. (*McKay v. Montana Union Ry. Co.*, ante, p. 15, cited.)—*Orecek v. McManus*, 152.
4. In reviewing a judgment rendered on motion for a nonsuit all facts will be considered as proved which the evidence tends to prove.—*Id.*
5. Error in nonsuit may be reviewed by a statement on appeal.—*William Merchantile Co. v. Fussy*, 401.
6. Upon a motion for a nonsuit that which the evidence tends to prove will be considered as proved.—*State ex rel. Pigott v. Benton*, 306.

NORTHERN PACIFIC GRANT.

The decision of the secretary of the interior that certain land was not included within a grant to the defendant corporation is conclusive until reversed in a direct proceeding for that purpose, and cannot be collaterally attacked in an action to recover the purchase price of the land by one to whom it had been conveyed by the defendant.—*Colburn v. Northern Pacific R. R. Co.*, 476.

PARTIES.

In an action to vacate fraudulent assignment, see ASSIGNMENT, 2.

1. In an action upon an attachment bond, which was signed only by the sureties, the plaintiffs in the attachment suit are parties having an interest in the controversy adverse to the plaintiff, and therefore may be properly joined with the sureties as parties defendant. (*McIntosh v. Hurst*, 6 Mont. 237; *Pierce v. Miles*, 5 Mont. 549, cited.)—*Hoskins v. White*, 70.
2. Where it is disclosed by proof upon the trial of a cause that the plaintiff is a minor, and the complaint is then amended to show the minority and emancipation of plaintiff, it is error for the court to sustain a demurrer to the complaint on the ground of want of legal capacity to sue, but the court, upon the suggestion of plaintiff's minority, should clothe him with capacity to sue by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian.—*Id.*
3. The emancipation of a minor by his parents does not clothe him with capacity to sue in his own name without the appointment of a guardian.—*Id.*

PARTNERSHIP.

Right of partner to homestead in partnership estate, see HOMESTEAD, 1.

1. Where conveyances were made by the plaintiff, who was the owner of mining property, of an undivided two-thirds interest therein to defendant, who, in consideration thereof, agreed to cause such development work to be done as to put the property into a marketable condition and to use his best endeavors to sell the property at the highest price obtainable, bearing all expense of development and of negotiating a sale, and to pay the plaintiff one-third of the gross proceeds upon making a sale, a partnership relation is created between the plaintiff and defendant in respect to the property which is the subject of the enterprise.—*McIntosh v. Perkins*, 148.
2. An action in equity by one of such partners against the other for an accounting is proper where the plaintiff had done the development work under employment by the defendant, who, having sold the property after obtaining plaintiff's remaining one-third for that purpose, refused upon demand to pay over to the

plaintiff his share of the proceeds of the sale and the reasonable value of the development work.—*Id.*

2. The granting of an injunction in such case restraining the bank, in which were deposited the proceeds of the sale of the property, from paying it over to the defendant and restraining the vendee from paying to the defendant a balance owing on the purchase price of the property is irregular, for if the facts warranted the placing of the partnership funds in *custodia legis* it should have been accomplished through the appointment of a receiver.—*Id.*
4. A proper case for the appointment of a receiver is not shown where it appeared from the complaint that all the joint operations in respect to the partnership property had been consummated except the collection of the balance of the price for which it had been sold, and there remained simply a dispute between plaintiff and defendant as to the proper apportionment of the fund arising from the sale of the property, there being no averment that the defendant was insolvent or that the partnership fund was in danger of being lost, squandered, or removed from the jurisdiction.—*Id.*

PHYSICIANS AND SURGEONS.

1. While the jurisdiction bestowed upon the district court by the constitution cannot be abridged by the legislature, it may invest such court with additional jurisdiction in harmony with its character and not a usurpation of the constitutional powers of any other court, and therefore the provision of the act to regulate the practice of medicine (Sess. Laws 1889, p. 175) allowing an appeal to the district court by the aggrieved party in case of the revocation or refusal by the board of medical examiners of a license to practice medicine cannot be held to contravene article VIII, section 11 of the constitution providing that the district court shall have appellate jurisdiction in all cases arising in justices' and other inferior courts, the latter provision not being prohibitory in form.—*State ex rel. Kellogg v. District Court of First Judicial District*, 870.
2. An appeal by a physician to the district court from the action of the board of medical examiners in revoking his license to practice his profession is not nugatory in that the act allowing such appeals prescribes no rules to guide the district court in adjudicating that class of cases.—*Id.*

PLEADING.

See CLAIM AND DELIVERY, 1.

Sufficiency of complaint on foreclosure of mechanic's lien, see MECHANIC'S LIEN, 2.
Sufficiency of complaint in action to vacate fraudulent assignment, see ASSIGNMENT.

1. A promissory note is not itself the payment of a debt, but is the written evidence of the debt, and therefore, in an action to recover money due on a non-negotiable instrument, where the answer averred facts showing an indebtedness from plaintiff's assignor to defendant for money loaned, the fact that such indebtedness was proved to be evidenced by a note does not create a variance between the pleadings and proof.—*Kleinschmidt v. Kleinschmidt*, 64.
2. Section 101 of the Code of Civil Procedure providing that sham and irrelevant answers and irrelevant and redundant matter inserted in a pleading may be stricken out, contemplates that the sham pleading is such as appears manifestly and inherently sham or appears to be false by comparison with other declarations of the pleadings, which conditions should appear upon the face of the pleading alone and not by the consideration of affidavits contradicting such allegations.—*McDonald v. Pincus*, 83.
3. Where an answer to a complaint on a promissory note alleged a failure of the payee to perform an agreement for labor which was the consideration for the

note without alleging the terms of the agreement or the conditions or effect thereof, no ground of defense is stated, and the defendants having failed to amend their answer, the plaintiff is entitled to judgment on the pleadings.—*Id.*

- 4. An estoppel by judgment to be avoidable as a bar must be pleaded.—*Joseph v. Mady Clothing Company*, 195.
- 5. A complaint in an action on a promissory note which avers the execution and delivery of the note for a valuable consideration, stating the date, consideration, parties, principal sum, rate of interest, the amount due and unpaid, and that the plaintiffs are now the owners thereof and entitled to receive the money due and unpaid thereon, and have not indorsed or transferred said note, but that the same since its maturity has been lost, states a cause of action, and is not open to the objection that it does not show by any averment any promise in fact or by implication to pay any sum of money, or to pay the plaintiffs any money, nor when, according to defendant's promise, payment should be made.—*Schuttler v. King*, 216.
- 6. A general allegation in a complaint that plaintiff has suffered damage in the sum of five hundred dollars, by reason of defendant's wrongful ouster and withholding possession, will admit evidence of some damage, and an objection that the complaint is insufficient to sustain a judgment for damages, will not be sustained on appeal where the judgment-roll alone is before the court for review, and there is nothing from which the court can judge whether the proof received was germane to the allegation and the damages provable thereunder.—*Haggin v. Lorenz*, 406.
- 7. Plaintiff is not entitled to judgment on the pleadings in an action to quiet title to a fractional piece of land discovered by a later survey to lie between lots, which by the survey under which he purchased were contiguous, where the complaint, while alleging adverse possession of certain land from the time of his purchase, leaves it obscure as to whether such fractional piece was included, and to determine which would require the construction of certain deeds; and the answer, while admitting that the land occupied by plaintiff had been so occupied for more than five years, denied that his possession of the fractional piece was adverse or was taken under the deeds of his predecessors in interest or in any manner except in subordination to the legal title which was in the probate judge in trust for defendant.—*Horsky v. Moran*, 250.
- 8. The assumption and acceptance, by the defendant water company, of a contract to furnish water, made between plaintiff and another water company, is sufficiently shown where the complaint alleges that the defendant company assumed said contract, substituted itself for the old company, and performed acts only consistent with an adoption of the contract.—*Horsky v. Helena Consolidated Water Co.*, 229.
- 9. A valuable consideration for the assumption of a contract to furnish water is sufficiently shown by an allegation in the complaint that defendant, for a considerable time, collected the price and rates therein mentioned.—*Id.*

PRACTICE.

Directing verdict upon trial, see **NONSUIT**, 1, 2.

Notice of settlement of bill of exception, see **APPEAL**, 3.

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PROMISSORY NOTES.

See **NEGOTIABLE INSTRUMENTS**.

QUIET TITLE.

Tenant in common of mining claim, when not estopped to maintain action against cotenant, see MINES AND MINING, 1.

Findings by court in action to, see MINES AND MINING, 3.

Judgment on pleadings in action to, see PLEADING, 7.

RECEIVERS.

In action between partners for an accounting, see PARTNERSHIP, 3, 4.

The district court has not jurisdiction in an action for recovery of the possession of real property, with rents and profits, and damages for withholding possession, to dispossess the defendant on the commencement of the action, and before trial and judgment through the appointment of a receiver, upon a mere showing that the property was mortgaged, and that the defendant was insolvent, and was collecting the rents which plaintiff needed to pay the interest upon the mortgage debt.—*State ex rel. Greenland v. District Court of Second Judicial District*, 416.

SALES.

Of promissory note without delivery, see NEGOTIABLE INSTRUMENTS, 2.

1. In an action against a constable for conversion of personal property taken by him under an attachment against plaintiff's vendor, a written bill of sale from such vendor to plaintiff, although alone it may not have fully proved the sale and delivery was competent evidence, tending, as far as it went, to prove a sale, and was therefore admissible.—*Rodoni v. Lytle*, 123.
2. A bill of sale of personal property, absolute on its face, which is accompanied by an agreement that if the debt for which it was given be paid within a stated period the bill of sale should be canceled, is in effect a chattel mortgage, and, not being accompanied by an affidavit of good faith as required by section 1588, fifth division of the Compiled Statutes, where mortgaged chattels remain in the possession of the mortgagor, or acknowledged and filed, is void as against third parties.—*Story v. Cordell*, 204.
3. The marking of barrels of whisky with a cross and the vendee's name and removing them from the back of a store, and placing them in the center of the room, is not a sufficient delivery of possession as to third parties.—*Id.*

SCHOOLS.

1. The term "schoolhouse," as used in section 1885, fifth division of the Compiled Statutes, empowering school trustees to remove schoolhouses when the trustees may be directed by a vote of the district so to do, does not mean simply the house, but refers rather to the school plant, including the general equipment, pupils and teacher, and therefore a board of trustees has no authority to remove the school properties and equipment from the established schoolhouse to a house in another part of the district without being directed so to do by a vote of the district.—*State ex rel. Jay v. Marshall*, 136.
2. An application for a writ of *mundamus* to compel a board of school trustees to restore a school to the old schoolhouse, from which such board had removed it without authority, should have been denied where it appeared that after the relator had demurred to the appellants' answer the court continued the hearing, and ordered a school election to determine the question whether the action of the board in removing the school should be ratified, which resulted in the approval of the action of the board, which facts were presented to the court in a supplemental answer, although the court may not have had authority to order the election.—*Id.*

SEAL.

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Of statute defining property rights of married women, see HUSBAND AND WIFE, 2.

Of statute in respect to taxation of docket fee, see Costs, 4.

Of statute exempting from taxation property used for charitable purposes, see TAXATION, 2.

SUMMONS.

1. A district court summons is void if issued without the seal of the court, where the statute provides that it "must be issued under the seal of the court," and no jurisdiction of the defendant is acquired by the service thereof.—*Choate v. Spincer*, 127.
2. A judgment entered upon a default, after service of a summons issued without the seal of the court, is void, as well as the execution and all other proceedings thereunder.—*Id.*
3. An affidavit on which an order of publication of summons is made, which merely states that the defendant has departed from the state, and cannot be found therein, without stating that due or any diligence had been used to ascertain his whereabouts, or that any effort had been made to obtain personal service, and no reason is given for not stating his residence, is insufficient to authorize the issuance of the order, and a judgment taken in such case is void.—*Palmer v. McMaster*, 184.
4. It is not sufficient to state, in an affidavit for the publication of a summons, that the defendant has departed from the state, or cannot, after due diligence be found within the state, following the language of the statute, but the probatory facts constituting the diligence of the plaintiff to find the defendant should be stated in order to enable the court to judicially determine the ultimate fact that due diligence was exercised.—*Id.*

SURETIES.

In an action brought by an officer upon an indemnity bond given him to maintain an attachment it is no defense on behalf of the sureties that they signed such bond only on the condition and understanding that their principal should sign it before its delivery, which was not done, and of which condition the officer was ignorant, as such bond would be a valid obligation of the sureties without the signature of the principal procuring and delivering it, and his failure to sign would affect no substantial right of the sureties. (*Hoskins v. White*, *ante*, page 70; *Wibaux v. Grinnell Livestock Co.*, 9 Mont. 154; *Ney v. Orr*, 2 Mont. 539; *Pierce v. Miles*, 5 Mont. 548; *Hedderick v. Ponlet*, 6 Mont. 348, cited.) —*Woodman v. Calkins*, 363.

TAXATION.

1. The intention of an institution of purely public charity, to use certain of its lands for the purpose of erecting buildings for charitable purposes is not sufficient to exempt such lands from taxation under the constitution (Art. XII, § 2) and the revenue act (Laws, 1891, § 2), exempting from taxation such property as is used exclusively for institutions of purely public charity.—*Montana Catholic Missions, S. J., v. County of Lewis and Clarke*, 559.

2. Section 2 of article XII of the constitution, and section 2 of the revenue act of 1891, enacted pursuant thereto, exempting from taxation certain property, "and such other property as is used exclusively" for certain societies, "for educational purposes, places of religious worship, hospitals, . . . and institutions of purely public charity," do not exempt a charitable institution as an association or corporate body, from the payment of taxes, but only such property of the institution as is used exclusively for charitable purposes.—*Id.*

TENANTS IN COMMON.

Of mining claim, actions between, see MINES AND MINING, 1.
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Rebutting testimony, see EVIDENCE, 6.

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- Where a demurrer to a complaint has been overruled, it is error for the court to exclude evidence offered to prove the allegations at which the demurrer had been directed, upon the ground that such allegations were insufficient to admit the proof, without first giving the plaintiff an opportunity to amend the complaint.—*Creek v. McManus*, 152.
- In an equity case, where the findings of the jury are advisory, error, if any, in not sustaining a challenge to a juror, is immaterial where the findings were adopted and are not attacked on appeal.—*Leggatt v. Leggatt*, 190.
- A verdict in favor of plaintiff is sufficient without stating the amount awarded, where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due.—*Joseph's v. Mady Clothing Co.*, 195.
- It is not error to permit a defendant to amend his answer while the jury is being impaneled where the amendment does not surprise, injure, or inconvenience the plaintiff, and no continuance is rendered necessary or demanded on account thereof.—*Jorgenson v. Butte and Montana Com. Co.*, 288.
- Upon motion for a nonsuit that which the evidence tends to prove will be considered as proved.—*State ex rel. Pigott v. Benton*, 306.

VARIANCE.

Between pleading and proof, see PLEADING, 1.

VENDOR AND VENDEE.

A vendee who has accepted a deed from a vendor, who is afterwards found to have had no title to convey, is not compelled to await an ouster and then sue on the covenants of the deed, but may sue to recover the money paid on a contract for the purchase of the land.—*Colburn v. Northern Pacific Railroad Company*, 476.

VENUE.

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In prosecution for uttering forged instruments, see CRIMINAL LAW, 8.

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WITNESSES.

Testimony of absent, see CRIMINAL LAW, 13.

Cross-examination of, in action for damages, see EVIDENCE, 9.

In an action for the recovery of the possession of land, and the value of rents and profits during the period of wrongful detention, plaintiff cannot properly be cross-examined as to information concerning the use which had been made of the premises, where the direct examination related only to the stipulations of an agreement whereby the premises were leased.—*McCormick v. Gleim*, 469.

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